Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

SAGE HOSPITALITY RESOURCES, LLC,
Petitioner,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN M. O'DONNELL
Counsel of Record

LITTLER MENDELSON, P.C.
DOMINION TOWER
625 LIBERTY AVENUE
26TH FLOOR
PITTSBURGH, PA 15222-3110
(412) 201-7640

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

Whether the Third Circuit, in direct conflict with holdings of this Court and other courts, erred in concluding that there was no labor law preemption of a city's legislated requirement that private employers, outside the construction industry, enter into a union agreement waiving rights of the employer protected by the National Labor Relations Act, under circumstances in which no private owner or developer would be entitled to impose such a requirement. *See Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir. 2004)(Petition for Rehearing pending); *cf. Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686 (5th Cir. 1999).

CORPORATE DISCLOSURE

Petitioner, Sage Hospitality Resources, LLC, is a privately owned company. There are no publicly traded corporations that own 10% or more of Petitioner's stock.

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No. _____

In the Supreme Court of the United States

Sage Hospitality Resources, LLC, *Petitioner*,

v.

Hotel Employees and Restaurant Employees Union, Local 57, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sage Hospitality Resources, LLC, Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS AND ORDERS BELOW

Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 390 F.3d 206 (3rd Cir. 2004)

Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC, 299 F.Supp. 2d 461 (W.D.Pa. 2004)

The Order of the 3rd Circuit Court of Appeals dated December 14, 2004, denying Petitioner's timely petition for rehearing is unreported.

JURISDICTION OF THIS COURT

The judgment of the 3rd Circuit Court of Appeals affirming the judgment of the District Court granting summary judgment in favor of Respondent and denying summary judgment in favor of Petitioner was issued on November 15, 2004. The order of the Court of Appeals denying Petitioner's Petition for Rehearing was issued December 14, 2004. Jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10(c) of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

Relevant Provisions of the National Labor Relations Act, 29 U.S.C. §§ 158(a), (b), (c), (e) and (f)

Set forth in Appendix

Relevant provisions of the Labor Management Relations Act, 29 U.S.C. §§ 186(a), (b), (c), and (d)

Set forth in Appendix

Ordinance # 22 of 1999, of the City of Pittsburgh, Pennsylvania, titled: "An Ordinance Supplementing the Pittsburgh Code, Title One, Administrative, Article VII, Procedures, Chapter 161, Contracts, by adding Section 161.30 – Requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to

collective bargaining agreements where the City of Pittsburgh has a financial or proprietary interest."

Set forth in Appendix

"Resolution" passed by the Council of the City of Pittsburgh: "Repealing Bill No. 1020 entitled Adopting a Tax Increment Financing Plan presented by the Urban Redevelopment Authority of Pittsburgh creating the Fulton Building Tax Increment Financing District, and making certain findings."

Set forth in Appendix

STATEMENT OF THE CASE

Petitioner is a hotel management company which operates hotels throughout the United States. In early 1998, Petitioner began work on a hotel project in Pittsburgh, Pennsylvania, which involved extensive renovation of an old office building in downtown Pittsburgh. Petitioner sought approval for Tax Increment Financing ("TIF") from the Urban Redevelopment Authority (the "URA") of Pittsburgh. The URA is a public authority which includes as participants the City of Pittsburgh, Allegheny County, and the School District of the City of Pittsburgh.

In February, 1999, the URA approved a TIF financing arrangement, whereby approximately $3.6 million of the renovation costs would be advanced to Sage from the URA in the form of TIF financing. In July, 1999, the City of Pittsburgh passed Ordinance # 22 (Appendix E, 46a-51a), titled:

> "An Ordinance Supplementing the Pittsburgh Code, Title One, Administrative, Article VII, Procedures, Chapter 161, Contracts, by adding Section 161.30 – Requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements where the City of Pittsburgh has a financial or proprietary interest."

The ordinance required that employers of employees of hospitality operations must at a minimum: ". . . become signatory to valid collective bargaining agreements or other contracts under 29 U.S.C. Section 185 with any labor organization seeking to represent [its employees]. . . . [that] [e]ach collective bargaining agreement or contract must contain a provision prohibiting the labor organization and its

members, and in the case of a collective bargaining agreement, all employees covered by the agreement, from engaging in any picketing, work stoppages, boycotts or other economic interference . . . , [A]ll disputes relating to employment conditions or the negotiation thereof shall be submitted to final and binding arbitration. . . . [T]hat any work . . . to be done by the Contractor's or Employer's contractors, subcontractors, tenants or subtenants shall be done under collective bargaining agreements or other contracts under 29 U.S.C. Section 185 . . . containing the same provisions as above. A contractor or employer shall be relieved of the obligations of this section with respect to a labor organization if the labor organization places conditions upon its No-Strike Pledge that the City Council finds, after notice and hearing, to be arbitrary or capricious." (App. 47a-48a).

On February 13, 2001, with renovations nearly completed, and less than a month before the opening of the hotel, the City passed a Resolution (Appendix F) rescinding the TIF financing because "Sage Properties has not reached an agreement with a labor union to ensure labor peace during the operation of the Fulton Building Hotel, potentially threatening the City's proprietary interest in the project." (App. 53a).

Faced with the prospect of losing the previously approved TIF funds, which could have, *inter alia*, constituted a default relative to other loan sources, Petitioner signed an agreement with Respondent ("Memorandum of Agreement" set forth in Appendix G, App. 55a-63a; hereinafter referred to as the "Neutrality Agreement") that was deemed acceptable by the City Council, and provided for recognition of the union through a "card-check" procedure. Upon the signing of the

Neutrality Agreement, the Mayor vetoed the Council's Resolution rescinding the TIF agreement.

In June of 2002, Respondent requested a card-check pursuant to the terms of the Neutrality Agreement. Petitioner refused on the basis that the agreement was void as having been executed in violation of federal labor law.

On September 20, 2002, Respondent filed an action in the District Court seeking to compel arbitration pursuant to the terms of the agreement. Petitioner defended on the basis that the Neutrality Agreement was void *ab initio* as being in violation of federal labor law based on principles of preemption under the NLRA, and because the terms of the agreement required Petitioner to provide "things of value" in violation of Section 302 the LMRA (29 U.S.C. §186). Petitioner also raised state law issues.

The facts are not disputed. On cross-motions for summary judgment, the District Court declined to address the federal preemption issue. It ruled that the Neutrality Agreement was enforceable on its face, that the actions of the City were not dispositive, and because the City was not a party to the case. (App. 34a). The District Court also summarily dismissed the Section 302 argument. (App. 33a-34a). The District Court did not address the state law issue. The Court granted Respondent's Motion for Summary Judgment and denied Petitioner's Motion.

On appeal, the Court of Appeals found that the actions of the City *were* relevant to determining if the agreement was enforceable. It concluded, "If the City's efforts to promote the Agreement are preempted by federal labor law, then the executed agreement between the parties may be deemed void." (App. 10a).

The Court then reviewed the history of federal labor law preemption and discussed both *Garmon* preemption and *Machinists* preemption. *Garmon* preemption protects the supremacy of federal rights and the supremacy of the NLRB's primary jurisdiction. With limited exceptions, it preempts state and local law that regulates conduct actually or even arguably protected by Section 7 of the Act or prohibited by Section 8. *San Diego Bldg. & Constr. Trades Council v. Garmon*, 359 U.S. 236, 244-245 (1959). *Machinists* preemption advances the Congressional policy that certain conduct should be left unregulated by any governmental body. It prohibits state and local regulation that the courts conclude "upsets the balance of power between labor and management expressed in our national labor policy" by "introducing some standard of properly 'balanced' bargaining power ... [or defining] what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced state of collective bargaining.'" *Lodge 76, Int'l Assoc. of Machinists v. Wis. Employee Relations Comm'n*, 427 U.S. 132, 146 (1976); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986)(quoting *Machinists* 427 U.S. at 149-150).

The Court of Appeals relied heavily on this Court's ruling in *Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993)(the "*Boston Harbor*" case), a case upholding the ability of state agencies to impose union agreements under the unique circumstances of the construction industry, "when acting in the role of purchaser of construction services, act[ing] just like a private contractor would act." 507 U.S. at 232. The Court of Appeals extended *Boston Harbor's* "market participant" exemption from labor law preemption for the first time to employers outside the construction industry and to circumstances in which no private owner or developer would

be entitled to impose a union agreement requirement on any private employer.

In this regard, the Court of Appeals considered, but disagreed with, the holding of *U.S. Chamber of Commerce v. Lockyer,* 364 F. 3d 1254 (9th Cir. 2004)(Petition for Rehearing pending), which found the proprietary exception from labor law preemption under *Boston Harbor* to be limited to those situations where the state's behavior is similar to that of behavior typical of private parties in like circumstances. App. 20a-21a, n.7.

The Court of Appeals failed to address or distinguish the decision in *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997)("A tax exemption is not the sort of direct state involvement in the market that falls within the market participant doctrine."); followed by *Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73 (D.R.I. 2000)(court held that imposition of a union-only requirement through coercive enforcement of tax financing of local development did not constitute market participation within the meaning of the *Boston Harbor* case.)

The Court of Appeals did not address the fact that a pivotal component of the decision in *Boston Harbor*, one not applicable in the instant case, was Section 8(f) of the NLRA which created an exception that "explicitly permits employers in the construction industry – **but no other employers**– to enter into pre-hire agreements [with unions]." *Boston Harbor*, at 230 (Emphasis supplied). The Court also ignored the fact that unlike the situation in *Boston Harbor*, the City was not acting as an owner or manager of property under development, but rather was acting as a regulator mandating labor relations policies and provisions for employers and

employees involved in hospitality operations, under the guise of being an investor.

The Court of Appeals also dismissed the Section 302, "things of value" argument. It also dismissed the state law claim which Petitioner is not presenting to this Court for Review.

REASONS FOR GRANTING THE PETITION

I. THIS COURT'S INTERVENTION IS REQUIRED TO RESOLVE A CONFLICT WITH PRIOR DECISIONS OF THIS COURT, AND AMONG THE CIRCUITS, CREATED BY THE THIRD CIRCUIT'S SANCTIONING OF PITTSBURGH'S REGULATORY IMPOSITION OF UNION AGREEMENTS ON PRIVATE EMPLOYERS IN THIS CASE, IN DIRECT CONTRAVENTION OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act protects the right of employers to enter into agreements with labor unions only on a voluntary basis, as a result of good faith bargaining in a manner regulated by the National Labor Relations Board ("NLRB"). Not even the NLRB is permitted to force a private employer to enter into any involuntary agreement with a union. *See H.K. Porter, Inc. v. NLRB*, 397 U.S. 99 (1970)(citing Section 8(d) of the Act). In addition, Sections 8(e) and 8(f) of the Act expressly protect employers outside the construction industry from being coerced into signing a union agreement. *See Bldg. & Const. Trades Council v. Associated Builders and Contractors of Mass./R,.I., Inc.*, 507 U.S. 218, 230 (1993) ("*Boston Harbor*").

In the present case, the Third Circuit's decision is the first reported ruling upholding a local government requirement that employers outside the construction industry enter into union agreements waiving rights protected by the NLRA. The City of Pittsburgh passed an ordinance that mandates that private, non-construction industry employers operating hotels, restaurants, bars, clubs, cafeterias, or other food and beverage operations sign collective bargaining agreements with a union, or other agreements relating to issues involving union recognition and bargaining, as a condition of receiving any form of financial assistance (including tax incentives) from the City.

In upholding the Pittsburgh ordinance, the Court of Appeals misapplied and improperly extended this Court's holding in *Boston Harbor*. In particular, the Court of Appeals applied *Boston Harbor's* "market participant" exemption from labor law preemption to local government conduct that is dissimilar to any behavior that private entities could lawfully engage in. The Court of Appeals decision conflicts directly with the Ninth Circuit's holding in *Chamber of Commerce v. Lockyer*, 364 F. 3d 1254 (9th Cir. 2004)(Petition for Rehearing pending); with the Fifth Circuit's holding in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999)(matter involving question of preemption under ICC Termination Act of 1995, applying *Boston Harbor* preemption analysis), and with this Court's decision in *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986). *See also Associated Builders and Contractors of Rhode Island, Inc. v. City of Providence*, 108 F Supp. 2d 73 (D.R.I. 2000).

One author, referring to the current conflict among various courts over the extent of the "market participant" exemption, stated the following:

> [T]he Court held in Boston Harbor that 'in the absence of any express or implied indication by Congress that a state may not manage its own property when it pursued its purely proprietary interests, and where analogous private conduct would be permitted, [the Supreme Court] will not infer such a restriction.' **The Court has not subsequently clarified the immunity. Incoherence reigns in the lower courts because of the differences with respect to the point where variation from Boston Harbor's facts removes the immunity**.

Roger C. Hartley, *Preemption's Market Participant Immunity – A Constitutional Interpretation: Implications for Living Wage and Labor Peace Policies*, 5 U. Pa. J. Lab. & Emp. L. 229, 233 (Winter, 2003)(Emphasis added).

This Court's review and intervention are required to correct a significant anomaly in the law of federal preemption created by the Third Circuit's decision, which is contrary to decades of precedent. Absent redress by this Court, employers will become subject to a patchwork quilt of state and municipal regulation and coerced waivers of rights otherwise protected by federal labor law, under the guise of market participation.

A. The Court of Appeals Decision Has Created A Conflict with Prior Decisions of this Court, and Among The Circuits, As to The Scope Of The Proprietary Exception to Labor Law Preemption Set Forth In *Boston Harbor*, By Improperly Expanding The Exception Outside the Construction Industry To Include Regulatory Behavior Which Private Entities Could Not Engage In.

In *Golden State Transit*, the City of Los Angeles refused to renew the operating franchise of a taxi cab employer unless and until the employer settled a disruptive labor dispute by entering into a collective bargaining agreement with a local union. Like the City of Pittsburgh in the present case, Los Angeles argued to this Court that it was protecting important local economic interests by requiring the employer to reach agreement with the union. Rejecting that argument, this Court held as follows:

> Free collective bargaining is the cornerstone of the structure of labor management relations carefully designed by Congress when it enacted the NLRA.... Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations.... A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power..." or to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining.

475 U.S. at 619. See also *H.K. Porter, Inc., supra* at 108 ("The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the

Act itself. One of these fundamental policies is freedom of contract.").

Accordingly, the Court found the City's imposition of a labor agreement on private parties to be preempted by the NLRA.

In *Boston Harbor,* the Court recognized a limited exemption from the *Golden State* preemption doctrine in the circumstance where a state authority engaged in conduct that any private entity could also engage in, specifically in the construction industry. There, the Massachusetts Water Resource Authority (MWRA) sought to enter into a project labor agreement for a large construction project, a type of agreement common to the construction industry and uniquely sanctioned by the NLRA, in Sections 8(e) and 8(f). 29 U.S.C. §158(e) and (f) (App. 44a-45a). These sections of the Act permit "employers in the construction industry" and *only* such employers, to require subcontractors to enter into union agreements as a condition of performing work on a particular construction project. Under these unique circumstances, the Court upheld the project agreement, as follows:

> When the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces that Congress expected to find; it exemplifies them.

507 U.S. at 233.

Subsequent decisions have developed a two-part test derived from *Boston Harbor* to determine when the market

participant exception to federal labor law preemption applies. The test was first articulated by the Fifth Circuit in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999). There, the Fifth Circuit defined the test as follows:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties that a regulatory impulse can be safely ruled out.

More recently, the Ninth Circuit applied the same test to find preempted a California law that restricted state contractors from using state funds to influence employee choice as to whether to be represented by a union. *Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir. 2004). The Ninth Circuit found that the state law "did not reflect California's interest in the efficient procurement of goods and services, as measured by the similar behavior of private parties." The Ninth Circuit contrasted the state law it struck down, on the one hand, with the type of project labor agreement upheld in *Boston Harbor*, on the other hand, *i.e.*, one "that private employers often enter into in the construction field." Id.

In the present case, the Court of Appeals relied upon *Boston Harbor* as creating a broad exception to the general application of preemption doctrine in finding that the City of Pittsburgh ordinance is not preempted. But, the Court failed to properly apply the holding of that case. The Court of Appeals specifically rejected, and thereby came into conflict with, the Ninth Circuit's and Fifth Circuit's requirement (as first expressed in *Boston Harbor* itself) that the proprietary/market participant exception should be limited to state conduct that private parties could engage in, and typically did engage in, under like circumstances.

The Court of Appeals in this case has rejected the two-part test adopted by *Cardinal Towing*. Specifically, the Court declines to consider whether or not the state had an intent to "regulate" versus address its limited proprietary concern, and declines to survey what private parties do in like circumstances (App. 20a-21a, n.7). There appears to be no consideration of the fact that the Ordinance passed by the city, and the resulting agreement at issue in this case "directly regulates the union organizing process itself" and "interferes with an area Congress intended to leave free of state regulation." *Lockyer* 364 F.3d 1154, at 1165.

The Pittsburgh ordinance fails to withstand a comparison with the typical behavior of private parties in similar circumstances. Unlike a typical private purchaser of services, the City does not simply require successful bidders to guarantee uninterrupted delivery of the contracted-for services in the event of a labor dispute and to cover the purchaser's related costs if that guarantee is breached. Nor does the City require contractors, in the event of an actual disruption of contracted-for services, to resume providing services to the City by a date certain on pain of contract termination. Instead, the City has set up a regulatory system to prevent

potentially disruptive labor disputes from arising in the first place between contractors and their employees. A typical private purchaser of services is unlikely to act (or even to have market power, or the legal authority, to act) in the complex prophylactic manner of Ordinance #22. See *Wis. Dep't of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 287 (1986)("[T]here can be little doubt that the NLRA would prevent Wisconsin from forbidding *private parties* within the state to do business with repeat labor law violators.")(Emphasis in original).

The ordinance at issue in this case is thus of a dramatically different order than the proprietary policies considered in *Boston Harbor* and in *Building & Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003). Both those cases dealt with government bodies making typical commercial judgments about how best to accomplish construction projects in an economical and efficient manner. Specifically, in both of those cases, government bodies were exercising traditional options that Congress expressly authorized for private construction industry employers under Sections 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f). See *Boston Harbor*, 507 U.S. 218, at 229-33; *Allbaugh*, 295 F.3d at 35.

Here, unlike in *Boston Harbor* and *Allbaugh*, it cannot reasonably be said that the restrictions imposed by Ordinance 22 on covered contractors are of a type that Congress explicitly authorized in the NLRA. Indeed, absent the unique provisions of 8(e) and 8(f) applicable only to the construction industry, private entities are expressly barred from forcing employers to enter into agreements with labor organizations. Such coerced agreements interfere with the rights of both employers and employees protected by Sections 7 and 8 of the NLRA. 29 U.S.C. §158(a)-(b) (App. 37a-43a). For the

reasons discussed above, the Pittsburgh ordinance cannot possibly be explained (as the government construction project cases can) as the exercise of a traditional commercial option that "reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances." *Cardinal Towing*, 180 F.3d at 693.

The laundry list of provisions set forth in Ordinance 22 that must be contained in "each collective bargaining agreement or other contract" between covered employers and the unions that have been forced upon them further conflicts with the "fundamental policy" of "freedom of contract" set forth in *H.K. Porter Co., Inc.*, and *Golden State Transit*.

Pittsburgh's ordinance is thus preempted because it conflicts with the Board's established policies for effectuating free and fair choice by employees with respect to union representation, with the guarantees of Section 8(d) of the Act to voluntarily negotiate contract terms, and with Congress' purpose in making the Board a forum available to employees, employers, and unions who are caught up in resolving questions concerning representation. Contrary to the finding of the Court of Appeals in this case, because the Pittsburgh ordinance is directed at employers hired to staff the operations of hotels, motels, restaurants, clubs, cafeterias and food and beverage operations – as opposed to construction industry employees – there is no exception from preemption doctrine that allows the City of Pittsburgh to intrude on federal labor policy as suggested by the District Court, and the Court of Appeals, below.

B. The Court of Appeals Further Erred, And Further Conflict Has Been Created, Because The Pittsburgh Ordinance Is A Taxation Measure Which Must Be Deemed Regulatory In Nature For That Reason Alone.

The Court of Appeals also erred in its application of the market participant exception to the Pittsburgh ordinance, because the City law at issue is fundamentally a measure of taxation. Taxation has been repeatedly found to constitute government regulation in its clearest form and the power to tax cannot be used to interfere with the collective bargaining process. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 593 (1997)("A tax exemption is not the sort of direct state involvement in the market that falls within the market participant doctrine." Case involving tax exemptions targeted to benefit in-state residents.) Relied on in *Associated Builders and Contractors of Rhode Island v. City of Providence*, 108 F Supp. 2d 73 (D.R.I. 2000).

In *City of Providence*, as here, a City attempted to force a hotel developer to adopt union agreements, as a condition of receiving tax incentives. Id. at 75. In that case, the City had a stronger argument concerning the applicability of *Boston Harbor* because the project labor agreement at issue was limited to duration of the project's construction. Id. A reviewing court nevertheless struck down the City's attempt to coerce the developer to adopt a PLA, on the ground that the City's use of its taxation power for such a purpose was clearly regulatory in nature and did not fall within the *Boston Harbor* exemption.

The court observed as follows:

> The Supreme Court has rejected the argument that a grant of favorable tax treatment constitutes market participation in its dormant Commerce Clause jurisprudence, which includes a similar exception to the one applied in Boston Harbor. [citations omitted] *** The Court reasoned that the governmental action "ultimately at issue" was not the purchase or sale of goods or services, but the "assessment and computation of taxes – a primeval governmental activity." ***
>
> This Court agrees that a grant of favorable tax treatment is not sufficient participation in the marketplace to shield the action from federal preemption. The City in this case is not "purchasing" construction services or otherwise exhibiting behavior analogous to that of private parties in the market place. It is carrying out its "primeval governmental activity" of assessing taxes and thus may not perform that activity in a manner that conflicts with federal law.

108 F.Supp.2d at 82-83.

Citing *Golden State Transit*, the court in *City of Providence* enjoined the City's ordinance as being regulatory action interfering with rights preempted by the National Labor Relations Act. *See also Hudson County Bldg. & Const. Trades Council v. City of Jersey City*, 960 F.Supp. 823, 833 (D. N.J. 1996) (preemption found, and market participation doctrine held not to apply, to ordinance requiring businesses receiving economic incentives, including tax abatements and exemptions, to make good faith effort to hire city residents).

The Court of Appeals should have applied the same reasoning here. Instead, the Third Circuit erroneously asserted that the City's interest in the success of the hotel venture was "precisely that of any developer who is relying upon cash flow to support debt service, repay bonds, and finance other development." (App. 23a). Contrary to the Court of Appeals' assertion, however, *no* private developer can make use of the tax system to support its cash flow, and the interests of the City in the development in this case were fundamentally regulatory in nature. And, state action in this area *is* subject to greater scrutiny than private action in the marketplace. *Gould*, 475 U.S. 282, at 290 ("But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.").

C. The Conflict Created By The Third Circuit's Decision Affects An Issue Of Great Public Importance.

Allowing the decision of the Court of Appeals to stand will result in immediate harm to private employers throughout the country. Efforts to regulate labor policy at both the state and local level are already the topic of litigation in federal courts in various jurisdictions across the country. The NLRB itself has expressed concern that, absent enforcement of NLRA preemption, states will increasingly use the leverage of their spending power in an attempt to restrict the rights of employers and employees guaranteed under federal law.

> The issue here is whether states are free to use their spending power to pressure employers to adopt neutrality policies. The answer, we submit, is that under established federal preemption principles, they are not. The California Statute, while nominally

> about state spending decisions, is really an impermissible regulatory attempt to substitute California labor policy for existing federal labor policy. Unlike California, Congress generally favors robust debate of union representation issues as a means of enhancing the opportunity for employees to make a free and informed choice."

From the amicus brief of the General Counsel of the National Labor Relations Board filed in the case of *Chamber of Commerce of the United States v. Lockyer*, 364 F.3d 1154 (9th Cir., 2004).

The Court of Appeals acknowledged that it is adopting a different standard in its analysis of whether state action is "proprietary" versus "regulatory" than the Ninth Circuit adopted in *Chamber of Commerce of the United States v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004). In footnote 7, the Court below states:

> The Court in *Lockyer* arguably relied on evidence of the subjective motivation of the legislature in adopting the challenged statute, and also talked in terms of whether the state's behavior was proprietary "as measured by the similar behavior of private parties." 364 F.3d at 1163. We do not believe, however, that *Boston Harbor* and its progeny require a factual investigation into the particular subjective motives of the relevant government agency, or a survey of what private parties do in like circumstances. (Citation omitted). We see the test as objective, based on the language and probable effect of the state ordinance or specification.

Appendix 20a-21a, n.7.

On February 11, 2005, the United States District Court for the Eastern District of Wisconsin, issued a decision in the case of *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, Case No. 01-C-0149 (E.D.Wis. 2005)("*Milwaukee County*")(Notice of Appeal filed February 28, 2005), wherein it specifically relied on the above language in this case to validate an ordinance of Milwaukee County that imposed virtually all of the substantive requirements of the "Neutrality Agreement" in this case on certain private non-union employers (including, *inter alia*, restrictions on dissemination of information by both the employer and the union; a requirement that the employer provide a list of names, addresses and phone numbers of employees to the union; that the employer provide the union access to the workplace for organizing purposes; and mandating arbitration of all disputes arising under the mandatory agreement). As with this case, the court in *Milwaukee County* deferred to the self-serving assertion of the county that it was seeking to protect a proprietary interest. Further, the court stated specifically, that as part of demonstrating a "proprietary goal . . . the government is not required to prove that the action in question is typical of private entities." And, "the government's burden of making such a showing is not a heavy one, for state and local governments are allowed some freedom to act innovatively in the marketplace." (at p. 14 of decision)(Thus juxtaposing the decision with *Gould*, *supra*, 475 U.S. at 290 "But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints.").

The result is that the District Court in the *Milwaukee County* case has adopted the reasoning of the 3rd Circuit and granted the local government *carte blanche* to define its own labor policy even in the event that it conflicts with federal

law. The Court below in this case, and the district court in *Milwaukee County*, would allow local governments broad leverage to define labor policy as they deem appropriate and remove the National Labor Relations Board from any involvement in the processes established by the Act. Thus, this case, and now its progeny, are in direct conflict with the policies enunciated in *Gould* and *Boston Harbor*. *Gould*, at 290 ("The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference.").

In fact, it is precisely because the conduct mandated by the city ordinance in this case *is not* typical of the conduct of private parties in the marketplace, and *is not* authorized by the NLRA that the unions have gone to local government to seek their assistance in the form of this ordinance.

In *Gould*, this Court warned of the potential harm to be done by allowing state and local governments to create their own labor policies in conflict with federal law.

> Each additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the "integrated scheme of regulation" created by Congress.

Gould, 475 U.S. at 288-289.

The harm predicted by the Court in *Gould* is now at hand.

As unions rely more and more on the cooperation of local government officials to assist them in organizing as demonstrated in this case, in *Lockyer*, and in the *Milwaukee County* case, it is more critical than ever that this Court clarify the limits of the market participant doctrine set forth

in *Boston Harbor*. See also *City of Providence* (City attempting to condition approval of tax incentives on employer entering into agreement with unions); *Food Lion v. UFCW*, 103 F.3Dd 1007, 1014 (D.C. Cir., 1997)(". . . the term ["corporate campaign"] encompasses a wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, but are not limited to, . . . political appeals . . . ."). The erroneous holding of the Courts below in this case must not become the standard by which the involvement of local governments into the relationships between private employers and unions are judged.

As noted above, Section 8 of the NLRA does not oblige an employer outside the construction industry to adopt union agreements at all, or to recognize any union that has not been certified on the basis of a secret ballot election conducted by the Board in accordance with its established policies and procedures. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103-04 (1970). *See also Linden Lumber v. NLRB*, 419 U.S. 301, 307-10 (1974). The Pittsburgh ordinance's broad directive is that, regardless of the wishes of employers or employees, and regardless of whether a union has demonstrated a majority interest, "all work must be conducted under collective bargaining agreements or other contracts under 29 U.S.C. Section 185(a) with any labor organization seeking to represent Hospitality Workers...." This mandate extends even beyond the Employer who is supposedly contracting with the City. It covers contractors, subcontractors, tenants, and subtenants, lessees, and licensees – without regard for the nature of *their* businesses. This directive is in direct conflict with the policy of the Board, sanctioned by this Court in *H.K. Porter* and *Linden Lumber*.

Under the regulatory scheme imposed by the City of Pittsburgh, covered employers who do business with the City no longer have an *unfettered* right to insist that questions of union representation affecting their employees must be resolved by a secret ballot election in accordance with the Board's established procedures and policies. *Linden Lumber*, 419 U.S. at 310. In fact, it foregoes entirely the right of employers to insist on an election, and the right of employees to decide if they wish representation.

The Ordinance also mandates a broad waiver of employees' rights to engage in any form of work stoppage, picketing or boycotts, or other economic interference, irrespective of whether the underlying dispute is subject to grievance and arbitration. The Ordinance goes even further by empowering the City Council, through notice and a hearing, to review any conditions placed by a labor organization on the no-strike pledge, using an arbitrary and capricious standard of review. There could be no clearer or more egregious example of a City impermissibly inserting itself – in a purely regulatory capacity – into labor relations matters governed exclusively by federal law.

Pittsburgh's ordinance cannot be squared with the NLRA policy of freedom of contract. Simply put, under Ordinance 22, covered contractors are no longer free to decide for themselves whether some type of union recognition agreement is in their interest and, if so, on what terms. Rather, they must negotiate such an agreement at the union's request and accept the terms mandated by the ordinance or by an arbitrator. Review by this Court is essential in order to correct the Court of Appeals' departure from established precedent on this important issue.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

John M. O'Donnell
Counsel of Record
Littler Mendelson, P.C.
Dominion Tower
625 Liberty Avenue, 26th Floor
Pittsburgh, Pennsylvania 15222
(412) 201-7640
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Dated December 14,2004]
No. 03-4168

HOTEL EMPLOYEES &	)
RESTAURANT EMPLOYEES UNION,	)
LOCAL 57	)
Appellee	)
	)
v.	)
	)
SAGE HOSPITALITY RESOURCES, LLC	)
Appellant	)
	)

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, and SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, FISHER, and VAN ANTWERPEN, Circuit Judges.

The petition for rehearing filed by appellant Sage Hospitality Resources, LLC in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Circuit in regular active service, and no judge who concurred

in the decision having asked for rehearing, and a majority of the circuit judges of the Circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

BY THE COURT,

/s/_____

Michael Chertoff
Circuit Judge

Dated: December 14, 2004

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03-4168
[Filed November 15, 2004]

Hotel Emples. & Rest. Emples. Union, Local 57 Appellee	)
v.	)
Sage Hospitality Res., LLC Appellant	)

CHERTOFF, *Circuit Judge*.

OPINION

In this case, we examine whether federal labor law preempts the City of Pittsburgh's decision to condition a grant of tax increment financing upon the recipient's acceptance of a labor neutrality agreement. We must address how labor law preemption analysis applies when local government seeks to affect labor relations on a publicly financed development project. For the reasons stated below, we hold that the City is not preempted from requiring parties receiving tax increment financing to sign a labor neutrality agreement.

I

In early 1998, Sage Hospitality Resources, LLC ("Sage") began development of a hotel construction project in Pittsburgh, Pennsylvania (the "City"). As part of its financing strategy, Sage approached the Urban Redevelopment Authority of Pittsburgh ("URA")[1] for tax increment financing ("TIF") to support the construction of the hotel.

Authorized under Pennsylvania's Tax Increment Financing Act, 53 Pa. Cons. Stat. § 6930.1 et seq., TIFs were created to "provide an alternative method for use by authorities in pursuing redevelopment efforts under the Urban Redevelopment Law[, 35 id. § 1701 et seq.]." 53 id. § 6930.2(a)(3). In a traditional TIF scheme, a locality issues tax increment bonds to finance the redevelopment of a chosen district. These bonds are secured by tax revenues generated from the expected increase in property values--i.e., the tax increment--in the district. *See generally* Frank S. London, Note, *The Use of Tax Increment Financing to Attract Private Investment and Generate Redevelopment in Virginia*, 20 Va. Tax Rev. 777, 780-81 (2001). That is, TIF pledges future

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[1] Incorporated in 1946, the URA is one of Pittsburgh's redevelopment authorities that serves as a "developer of last resort." Urban Redevelopment Auth. of Pittsburgh, *About the URA*, at http://www.ura.org/aboutTheURA.html (last visited Oct. 8, 2004). Urban Redevelopment Authorities were promulgated under the Urban Redevelopment Law, 35 Pa. Cons. Stat. § 1701 et seq., to promote development in blighted areas. *Id.* § 1702. The URA is comprised of the City of Pittsburgh, the School District of Pittsburgh, and Allegheny County.

increases in tax revenues generated by a project to finance certain eligible costs for the project.[2]

The URA approved the creation of the Fulton Building TIF District and issued the TIF bonds. Sage was apportioned $3.56 million in TIF support for the hotel development project. The plan provided that some sixty percent of revenues from the tax increment would go toward the repayment of the TIF notes. The remaining forty percent of the revenue from the tax increment would be provided to the three taxing bodies, the City, the School District, and Allegheny County.

On February 2, 1999, following the approval of the TIF funds, the City passed Resolution 45, which required Sage, inter alia, to "enter into a post-construction certified labor agreement with a bonified [sic] labor organization recognized by the National Labor Relations Board." (App. 60 (emphasis omitted).) Approximately five months later, on July 27, 1999, the City passed Ordinance 22 to supplement Chapter 161 under Title One, Article VII of the Pittsburgh Code.[3] The Ordinance added section 161.30, "Requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements where the

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[2] The increment is computed by determining a predevelopment property value baseline. Increases in value due to the project's completion and operation constitute the tax increment. The mechanics of TIF payments are outlined in *Pennsylvania State Building & Construction Trades Council v. Prevailing Wage Appeals Board*, 570 Pa. 96, 808 A.2d 881, 886 & nn.5-6, 9 (Pa. 2002).

[3] Title One, Administrative, Article VII, Procedures, Chapter 161, Contracts.

City of Pittsburgh has a financial or proprietary interest." (App. 47 (emphasis omitted).)

This section provides, in pertinent part:

> Each and every Contractor and Employer of employees hired to staff hospitality operations shall be or become signatory to valid collective bargaining agreements or other contracts under 29 U.S.C. Section 185 with any labor organization seeking to represent Hospitality Workers employed in the Contractor's and/or Employer's Hospitality Operations in a Capital Project as a condition precedent to its contract with the City of Pittsburgh. Each collective bargaining agreement or contract must contain a provision prohibiting the labor organization and its members, and in the case of a collective bargaining agreement, all employees covered by the agreement, from engaging from any picketing, work stoppages, boycotts or any other economic interference with the Hospitality Operations of Contractor or any persons under contract to it for the duration of the time required for the repayment of public indebtedness incurred to finance the acquisition or development of such Capital Project, or for the duration of Contractor's contract or contracts with the City for the operation of such Capital Project, whichever period of time is more extensive (the "No-Strike Pledge"). Each agreement must provide that during this time period, all disputes relating to employment conditions or the negotiation thereof shall be submitted to final and binding arbitration. Each and every Contractor and Employer of employees hired to staff Hospitality Operations shall require that any work under its contract or contracts with the City to be done by the

> Contractor's or Employer's contractors, subcontractors, tenants or subtenants shall be done under collective bargaining agreements or other contracts under 29 U.S.C. Section 185 containing the same provisions as specified above. (App. 48.)

By February 2001, construction of the hotel had been completed, but Sage had not yet entered into a labor agreement with any labor union. On February 13, 2001, the City passed a resolution dissolving the Fulton Building TIF District and withdrawing the issuance of the $3.56 million TIF funds because Sage had not entered into a labor agreement under Resolution 45 and Ordinance 22.

One week after the passage of the resolution, Sage signed a Labor and Neutrality Agreement (the "Neutrality Agreement" or the "Agreement") with the Hotel Employees and Restaurant Employees Union Local 57, AFL-CIO ("HERE"). The Neutrality Agreement contained, inter alia, a no-picketing promise and a provision that union representation would be determined using a card-check procedure. The Agreement provided that disputes arising under it would be settled by arbitration. Following the Agreement, the Mayor vetoed the City Council's February 13 repeal of the Fulton Building TIF District, and Sage received funding.

Following the opening of the hotel on March 16, 2001, HERE asked that Sage hold a "card count" to obtain recognition of its union pursuant to the terms of the Neutrality Agreement. On June 19, 2001, the City concluded "that a majority of employees [at the hotel] . . . has not designated the Hotel Employees, Restaurant Employees Union, Local 57 as their [sic] exclusive collective bargaining representative." (App. 67.) Citing the Neutrality Agreement, HERE sought to

arbitrate the outcome of the card count and requested a second card count in June of 2002, but Sage refused to comply with the request, claiming that the Neutrality Agreement was void.

On September 20, 2002, HERE filed a complaint in the District Court seeking to compel Sage to arbitrate issues arising pursuant to the Neutrality Agreement. Sage defended by arguing that the Neutrality Agreement was illegal and void *ab initio*.

In May 2003, both parties filed motions for summary judgment. In a memorandum issued on September 30, 2003, the District Court rendered a decision in favor of HERE and directed the parties to submit their dispute to arbitration pursuant to the Neutrality Agreement. The District Court held that (1) both parties were within their rights to reach a private agreement to provide an alternative method of deciding union representation and that such chosen method, i.e., card check procedures, was not illegal under federal law; (2) the Agreement's provisions for card check procedures did not constitute payment of "things of value" prohibited by section 302 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186; and (3) economic duress could not be used as a reason to invalidate the Agreement. The District Court ordered the parties to submit their dispute to arbitration pursuant to the Agreement.

We are presented with a final order of a District Court to review. Accordingly, we have appellate jurisdiction. 28 U.S.C. § 1291. Our review of a District Court's grant of summary judgment is plenary. *See Fed. Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 443 (3d Cir. 2003). We assess the record using the same summary judgment standard that guides district courts. *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000).

To prevail on a motion for summary judgment, the moving party must demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)).

II

In this appeal, Sage claims that (1) the Agreement HERE seeks to enforce is void *ab initio*, or voidable at its option, as having been secured in violation of federal law, specifically the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq.; (2) the terms of the Agreement require Sage to provide "things of value" to HERE in violation of section 302 of the LMRA; and (3) the Agreement is void *ab initio* because Pennsylvania's Home Rule Charter statute, 53 Pa. Cons. Stat. § 2962(f), prohibited the City from imposing the requirements set out in its ordinances and resolutions.

A

Sage's first argument is that the Neutrality Agreement signed with HERE is unenforceable, as a matter of law, because it intrudes into a field governed by federal labor law. Specifically, Sage argues that Ordinance 22 is preempted by section 7 of the NLRA.

The District Court declined to address the federal preemption question, holding that "because the legality of the City's actions is not dispositive in this case and because the City is not, itself, a party to this action, we need not decide this issue." *Hotel Emples. & Rest. Emples. Union, Local 57 v. Sage Hospitality Res., L.L.C.*, 299 F. Supp. 2d 461, 465 (W.D. Pa. 2004). Instead, the District Court examined the validity of the Neutrality Agreement on its face and rejected Sage's argument that the Agreement should be rendered void

because Sage entered into the Agreement under "economic duress." *Id.* at 466.

Although the City is not actually party to the Neutrality Agreement, the issue of federal preemption cannot be so easily bypassed. If, for example, private parties entered into a neutrality agreement because a city mandated it as a matter of law or regulation, there is no doubt that the question of federal preemption would be presented. *See Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395 (1986), 89 L. Ed. 2d 616. (preemption bars city from coercing party to enter into labor agreement). The fact that the government mandates--but is not party to--the labor agreement would not insulate the government's actions from preemption scrutiny.

By the same token, preemption issues are implicated where, as here, the impetus for a labor-management agreement is that the City demands it as a condition of public financing. While such an arrangement may turn out to escape or survive preemption analysis on the merits, we may not simply assume the question away by limiting our focus to the four corners of the Neutrality Agreement. *See, e.g., Hotel Emples. & Rest. Emples. Union, Local 2 v. Marriott Corp.*, 1993 WL 341286 (N.D. Cal. Aug. 23, 1993). Thus, we begin our examination of whether the Neutrality Agreement is valid by looking to the City's ordinance. If the City's efforts to promote the Agreement are preempted by federal labor law, then the executed agreement between the parties may be deemed void.

"It is by now a commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations." *Wis. Dep't of Industry, Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286, 106 S.Ct. 1057 (1986), 89

L. Ed. 2d 223. Section 7 of the NLRA protects, inter alia, the right of employees to "self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157. Section 8 of the NLRA enumerates "unfair labor practices," including: interference with an employee's exercise of rights guaranteed under section 7; domination or interference with the formation or administration of a labor organization; discrimination in hiring or employment to encourage or discourage membership in a labor organization; the refusal to bargain collectively; forcing or requiring an employer to join a labor organization; forcing an employer to bargain with a particular labor organization as the collective bargaining agent of its employees if another labor organization has been certified as the representative of such employees; and forcing or requiring a person to stop using, selling, or dealing in the products of any employer, producer, or manufacturer. *See* 29 U.S.C. § 158.

Though the NLRA contains no express preemption provision, we will find a state or local rule to be preempted by implication if "it conflicts with federal law or would frustrate the federal scheme, or . . . [if we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209, 105 S.Ct. 1904 (1985), 85 L. Ed. 2d 206. (quotation marks omitted).

The Supreme Court has carved out two distinct implied-preemption doctrines around the NLRA. The first, "Garmon preemption," forbids state and local regulation of activities that are "protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245, 79 S.Ct. 773 (1959), 3 L. Ed. 2d 775. ("When an activity is arguably subject to §

7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . . ."); *see also Gould*, 475 U.S. at 286. The state law may be a law of general application or a law directed specifically toward labor relations. *Garmon*, 359 U.S. at 246. Garmon preemption prohibits regulation even of "activit[ies] that the NLRA protects, prohibits, or arguably protects or prohibits." *Gould*, 475 U.S. at 286.

> This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' integrated scheme of regulation embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act.

Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 221-22, 113 S.Ct. 1190 (1993), 122 L. Ed. 2d 565. ("Boston Harbor") (quotation marks and citation omitted).[4]

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[4] *Garmon* also carved out two exceptions under which a state's actions may not necessarily be preempted by federal law. The Court provided that it would not bar the power of states

> to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.

359 U.S. at 243-44 (citation omitted); *see also Belknap, Inc.*

The second preemption principle, set out in Lodge 76, *International Association of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission*, precludes state and municipal regulation concerning those aspects of labor-management relations that Congress intended "to be controlled by the free play of economic forces." 427 U.S. 132, 140, 96 S.Ct. 2548 (1976), 49 L. Ed. 2d 396. (quotation marks omitted). This form of preemption recognizes Congress's desire to balance the power between employers and workers. *Id.* at 146-47. Under this rule, states are prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes or lockouts, unless such restrictions were presumably contemplated by Congress. *See id.* at 147.

The *Garmon* and *Machinists* preemption doctrines grew in the context of state laws that regulated the relationship between employers and labor. But what happens when the state acts not as a regulator, but as a market participant that deals as an employer or developer with its own labor force?

In *Boston Harbor*, the Supreme Court faced a Massachusetts Water Resources Authority ("MWRA") requirement that all contractors working on the Boston Harbor cleanup project must sign a prehire collective

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v. Hale, 463 U.S. 491, 498-99, 103 S.Ct. 3172 (1983), 77 L. Ed. 2d 798. The "local interest" exception has ordinarily been applied "where the conduct alleged concerned activity traditionally recognized to be the subject of local regulation, most often involving threats to public order such as violence, threats of violence, intimidation and destruction of property" and also to cover acts of trespass. *Pa. Nurses Ass'n v. Pa. State Educ. Ass'n*, 90 F.3d 797, 803 (3d Cir. 1996).

bargaining agreement that recognized a specific union and compelled all employees to become union members. *Boston Harbor*, 507 U.S. at 218, 220-22. Although the requirement impinged upon labor-employer collective bargaining that is normally governed by the NLRA, the Court ruled that MWRA's actions were not preempted by the federal labor statute. The Court reasoned that the MWRA was acting in its capacity as a proprietor, i.e., "market participant," and not as a regulator. *Id.* at 232. In that sense, the agency was on the same footing as any private employer dealing with its own subcontractors and their labor force.

> There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. . . . In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

Id. at 231-32. The Court sustained the MWRA's mandatory labor agreement because it was not an effort to regulate the conduct of others, but an "attempt[] to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost." *Id.* at 232.

In short, after *Boston Harbor*, preemption analysis only comes into play when the state's activity in question constitutes "regulation." *Id.* at 227. But a state will not be

subject to preemption analysis when it acts as a "market participant." See *id.* ("When a State owns and manages property, . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.").

Boston Harbor raises the issue that is pivotal in this case: What is the distinction between government acting as a regulator and government acting as a proprietor or market participant?

We begin by rejecting the notion that the line between regulation and proprietary action can be drawn simply by determining whether the state seeks to affect labor relationships through mandatory or prohibitive regulation on the one hand, or through the coercive effect of government's spending power on the other. The mere fact that government affects labor relations by imposing conditions under its power to procure or to spend does not automatically mean that the state is acting in a proprietary capacity that is immune from preemption review.

That is the teaching of *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. at 287. applying preemption analysis in that case, the Supreme Court rejected any facile distinction between regulation by mandate and regulation by conditioning public spending. The Wisconsin statute provided that state procurement officers were statutorily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." *Id.* at 284 (quotation marks omitted). Notably, the prohibition was not limited to firms that violated labor laws on a particular state-funded project, or even on a number of state-funded projects. Rather, it debarred

contractors who had violated labor laws on projects inside or outside the state. The Court rejected the claim that the statute "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id.* at 287. Observing the fact that debarment could be triggered by misconduct wholly unrelated to any transactions with the state itself, the Court held that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289 (quotation marks and citation omitted). Preemption analysis therefore applied, and the Court held that "because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations." *Id.* at 288.

Accordingly, the line between state regulation that is subject to preemption and market participation that escapes preemption must be drawn more finely than by simply distinguishing between regulation through mandatory laws and regulation achieved through the spending or procurement power. In describing where to draw this line, we begin by reviewing several seminal decisions.

As we have noted, *Gould* itself involved a provision that broadly disqualified firms with multiple past labor law violations from doing business with the state. Because the predicate violations were historical, and were not limited to transactions with the state itself, the Supreme Court easily discerned that the statute was not related to the state's proprietary interest in ongoing projects, but was simply punitive. In *Boston Harbor*, by contrast, the municipal authority's bid specification on a particular project required successful contractors to enter into a prehire labor agreement

on the project itself. This requirement was "specifically tailored to one particular job" and served to protect the municipal authority's interest in labor peace on that job. 507 U.S. at 232.

Gould and *Boston Harbor*, therefore, reflect polar outcomes despite the fact that both involved an exercise of spending or procurement power. The pivotal difference is that in the former case the state deployed its spending authority to achieve a goal far broader than merely protecting or fostering its own investment or proprietary interest, while in the latter instance the public agency limited its spending conditions to the protection of its investment or proprietary interest.

Other appellate courts that have examined the regulator/market-participant distinction also focus on the fit between the challenged state requirement and the state's proprietary interest in a particular project or transaction. In *Chamber of Commerce of the United States v. Reich*, the D.C. Circuit addressed an Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike. 316 U.S. App. D.C. 61, 74 F.3d 1322 (D.C. Cir. 1996). The Executive Order swept broadly, effectively forcing companies doing business with the federal government to avoid "permanent replacements even if the strikers are not the employees who provide the goods or services to the government." *Id.* at 1338. Indeed, even subsidiaries that did not do business with the government would be forced to comply with the order if an affiliated business organization sought a federal contract. As in Gould, this was a procurement condition that reached far more widely than what would be necessary to protect against disruption of those contracts in which the government had a direct proprietary interest. Not surprisingly, therefore, the D.C. Circuit held that the Executive Order was a regulatory

effort "to set a broad policy governing the behavior of thousands of American companies and affecting millions of American workers." *Id.* at 1337.[5] Preemption analysis therefore applied.

In *Building & Construction Trades Department v. Allbaugh*, however, the D.C. Circuit declined to find preemption applicable to a much more specific Executive Order that required federal agencies and private entities to maintain neutrality regarding project labor agreements in federally funded construction contracts. 353 U.S. App. D.C. 28, 295 F.3d 28 (D.C. Cir. 2002). Even though the Executive Order applied to all federally funded contracts, it applied only to those contracts. The Order did not speak to the behavior of contractors on other, nongovernment projects. The D.C. Circuit reasoned that "because the Executive Order does not address the use of [project labor agreements] on projects unrelated to those in which the Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as 'regulatory.'" *Id.* at 36. Preemption analysis, therefore, did not apply.

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[5] The government argued that even this broadly sweeping order promoted the government's proprietary interests because labor strife on projects unrelated to the government can have an overall deleterious impact on the vitality of the contractor. *Reich*, 74 F.3d at 1335. The D.C. Circuit rejected this type of attenuated proprietary benefit as insufficient to bring the case within *Boston Harbor*. We agree. In the real world, one can often plausibly contend that everything is related to everything else. We read the *Gould/Boston Harbor* distinction as requiring a much tighter fit between the procurement condition and the proprietary interest being advanced.

More recently, the Ninth Circuit has also addressed the regulator/market-participant distinction. In *Chamber of Commerce of the United States v. Lockyer*, the Ninth Circuit confronted a California statute forbidding employers who received a certain amount of state funds from using those funds to advocate for or against union organizing. 364 F.3d 1154 (9th Cir. 2004). The statute applied to all employers who accepted state grants in excess of $10,000, and it imposed separate accounting requirements on any business that either received state funds or entered into a contract with the state for more than $10,000. *Id.* at 1163. It also contained a provision for civil penalties and made employers subject to private civil suits. *Id.* Critically, the statutory restriction did not confine itself to state financing of projects employing workers who might be unionized. It affected employers in the use of state funds they had received for any reason. Analyzing the statutory language and its broad effect, the Ninth Circuit concluded:

> The statute's scope indicates a general state position, not a narrow attempt to achieve a specific goal. Thus, there is no question that [the statute is] designed to have a broad social impact, by altering the ability of a wide range of recipients of state money to advocate about union issues.[6]

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[6] *Lockyer* cited the Ninth Circuit's earlier decision in *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1415-16 (9th Cir. 1996), which held that the City of Oakland was not acting as a market participant when it canceled a newspaper subscription and refused to continue to pay for advertising during a labor dispute between the paper and its union. The *Alameda Newspapers* court held that the city was boycotting the paper, and hence acting as a market participant. This decision rests on an unusual set of facts, and its consistency with *Boston Harbor* and *Golden State* is

Id.; *cf. Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (treating municipal decision to award single contract for towing as proprietary action exempt from preemption under federal motor carrier statute).

These cases confirm that whether a government's condition of funding constitutes market participation that falls within the *Boston Harbor* exception to preemption review depends upon the following two step test: First, does the challenged funding condition serve to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier? Second, is the scope of the funding condition "specifically tailored" to the proprietary interest? *Boston Harbor*, 507 U.S. at 232. If a condition of procurement satisfies these two steps, then it reflects the government's action as a market participant and escapes preemption review. But if the funding condition does not serve, or sweeps more broadly than, a government agency's proprietary economic interest, it must submit to review under labor law preemption standards. We think this test faithfully embodies the teachings of *Gould* and *Boston Harbor*, and is consistent with the approaches taken by our sister circuits. See *Lockyer*, 364 F.3d at 1162 (quoting Cardinal Towing, 180 F.3d at 693); *Allbaugh*, 295 F.3d at 34-36.[7]

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debatable. Our reliance on *Lockyer* is not meant to imply, therefore, that we would agree with *Alameda Newspapers*.

[7] The court in *Lockyer* arguably relied on evidence of the subjective motivation of the legislature in adopting the challenged statute, and also talked in terms of whether the state's behavior was proprietary "as measured by the similar behavior of private parties." 364 F.3d at 1163. We do not believe, however, that *Boston Harbor* and its progeny require a factual investigation into

B

Is Ordinance 22 specifically tailored to advance or protect a proprietary financial interest of the City in the Fulton Building TIF District project? The best argument for Sage's challenge is as follows: The City has an economic interest in the success of the Fulton Building TIF District. But that interest is in the projected stream of increased tax revenue which the City hopes to receive if the project is successful. This kind of economic interest is governmental, not proprietary, because it is not comparable to the financial interest that an ordinary market participant has in a project. Rather, the City's interest is simply the traditional government interest in enhanced revenue that applies anytime the City seeks to increase its tax base.

If the foregoing were a complete description of the City's interest in the TIF project, Sage's objection would have considerable force. If we treated a public agency's bare interest in maximizing tax revenue as a proprietary interest, then preemption analysis would not apply to any state rule arguably designed to curtail labor strife that threatens to reduce corporate profits and, therefore, tax receipts. Expanding the concept of market participation to embrace so

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the particular subjective motives of the relevant government agency, or a survey of what private parties do in like circumstances. *Cf. Ky. W.V. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 616 (3d Cir. 1988) (declining to look at legislators' motives in determining whether state provision violates federal Commerce Clause). We see the test as objective, based on the language and probable effect of the state ordinance or specification.

broad a concept of proprietary interest would render preemption law in this area a nullity.

But that is not this case. Ordinance 22 is not designed simply to protect the City's interest in tax revenues. To be sure, as described above, under the TIF program, forty percent of any increased tax revenues flow to the City and other government entities. In this respect, the City's interest is nothing more or less than the traditional government interest in maximizing tax receipts. But the City is also a constituent in the URA--itself a public agency. In this capacity, the City is a partner in the proprietary interests of the URA itself. And the URA as issuer of the TIF bonds has a proprietary financial interest in the TIF development project that is the same as that of any (nonprofit) private entity that finances a development by issuing bonds.[8]

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[8] Although not dispositive, *see supra* note 7, we note that the City itself perceived Ordinance 22 as an effort to protect its financial interests. Ordinance 22 reads, in pertinent part:

> WHEREAS, The City of Pittsburgh has a *financial or proprietary interest* in certain capital projects which may include hospitality operations such as hotels . . . . It is anticipated that the revenues generated by these operations will be used in part to defray the public costs incurred in the construction and maintenance of such capital projects as well as to fund lease, rental or license payments to the City. *It is essential that these operations be conducted efficiently and without interruption and that no labor disputes affecting such operations may impact the revenues of other parts of such capital projects, which would in tern adversely affect the revenue stream to government.* The City has found that the efficient and uninterrupted operation of hospitality services may be threatened by labor disputes, and has found the only way to avoid this problem

Sixty percent of the tax revenues from the TIF are returned to the URA. Those revenues are applied to debt service and, if feasible, early retirement of the bonds. "Excess" revenues are applied by the URA to other development activities in the TIF district. Thus, the URA's interest in the success of the project that will yield the tax revenues is precisely that of any developer who is relying upon cash flow to support debt service, repay bonds, and finance other development. The Ordinance directly promotes and protects this interest. As in *Boston Harbor*, the Ordinance conditions funding on the employer entering into an agreement to eliminate picketing, work stoppages, and other economic disruptions.

This financial interest is similar, although not identical to, that of the City of San Francisco in, *Hotel Emples. & Rest. Emples. Union, Local 2 v. Marriott Corp.*, 1993 WL 341286 (N.D. Cal. Aug. 23, 1993). There, an agency of the City owned a piece of property that it wished to lease in part to a hotel in return for a percentage of gross proceeds. The District Court found that the requirement of certain labor agreements as an effective condition of the lease reflected a

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> is by requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements or other contracts under 29 U.S.C. sec. 185(a) with respect to the employees who will staff hospitality operations in capital projects . . . . Such contracts are the only method of insuring continuous provision of services under City contracts because under federal law, Employers may not unilaterally prohibit unions or their employees from engaging in work stoppages.
>
> (App. 47 (emphasis added).)

proprietary, not regulatory, interest on the part of the city, because the city "was acting as any private landowner would have in protecting a multimillion dollar real estate investment." *Id.* at *7. We find that reasoning apt here.

Ordinance 22 is not unduly broad in promoting and protecting the City's proprietary interest. The City's decision to insist that contractors and employers of staff hospitality employees sign no-strike agreements is specifically tailored to protect its proprietary interest in the value of the tax-revenue-generating property. Like the MWRA in *Boston Harbor*, the City has an interest in ensuring that labor strife does not damage the development. *See Boston Harbor*, 507 U.S. at 221 (upholding prehire agreement recommended by construction project manager to "maintain worksite harmony, labor-management peace, and overall stability throughout the duration of the project"); *Allbaugh*, 295 F.3d at 35. Significantly, the requirement that an employer sign a labor agreement is limited to hotels and hospitality projects receiving TIF funds. (App. 47-49.) The City does not require that participating contractors sign labor agreements extending to non-TIF projects, which they may also be undertaking. *Compare Chamber of Commerce of the United States v. Reich*, 316 U.S. App. D.C. 61, 74 F.3d 1322, 1324 (D.C. Cir. 1996) (order is regulatory when it touches on projects other than those that are government funded). Nor is this a situation in which the URA, having financed the project, has already retired its debt and therefore has no continuing interest in financial receipts from the TIF project.[9]

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[9] In *Marriott*, the District Court distinguished the circumstance in which a city sells property to a developer outright on condition that the latter enters into a labor agreement. In that instance, because the city's economic interest would have terminated, the

Given its considerable investment through the URA, the City acted as a reasonable investor in applying conditions to its multimillion dollar investment. Ordinance 22 is a specifically tailored response to a financial interest, given the income expected from the development and URA's position as the issuer of these and future securities. The Ordinance is therefore exempt from preemption review.[10]

C

Next, Sage charges that the Neutrality Agreement is void because it required Sage to provide "things of value" to the union in violation of section 302 of the LMRA. That section provides, in pertinent part:

> (a) . . . . It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--
> (1) to any representative of any of his employees who are employed in an industry affecting commerce . . .

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city's imposition of a labor agreement condition could not be characterized as protecting or furthering a proprietary interest. 1993 WL 341286, at *7. So, here, if the URA's interest were eliminated, the result might well be different.

[10] In its brief, Sage also states that it "would not have entered into the Agreement 'but for' the actions of the City and the consequent economic duress." (Appellant Br. at 4.) This argument is not briefed on appeal and so we will not address it. *See Lunderstadt v. Colafella*, 885 F.2d 66, 78 (3d Cir. 1989); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 237 (3d Cir. 1987). In any event, as the District Court explained, the argument is without merit as Sage has not met the standard to prove economic duress.

> (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer who are employed in an industry affecting commerce;
> (b) . . . . (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

29 U.S.C. § 186.

When Congress enacted section 302, it was "concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo v. United States*, 359 U.S. 419, 425-26, 79 S.Ct. 864 (1959), 3 L. Ed. 2d 915. (footnotes omitted); *see also Turner v. Int'l Bhd. of Teamsters*, 604 F.2d 1219, 1227 (9th Cir. 1979) ("The dominant purpose of § 302 is to prevent employers from tampering with the loyalty of union officials and to prevent union officials from extorting tribute from employers."). In short, section 302 "was passed to address bribery, extortion and other corrupt practices conducted in secret." *Caterpillar Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 107 F.3d 1052, 1057 (3d Cir. 1997) (en banc).

Not surprisingly, Sage is unable to provide any legal support for the remarkable assertion that entering into a valid labor agreement governing recognition of a labor union amounts to illegal labor bribery. There are many reasons why this argument makes no sense, including the language of

section 302 itself, which proscribes agreements to "pay, lend, or deliver . . . any money or other thing of value." The agreement here involves no payment, loan, or delivery of anything. The fact that a Neutrality Agreement--like any other labor arbitration agreement--benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a "thing of value" within the meaning of the statute. *Cf. Wyman-Gordon Co. v. NLRB*, 397 F.2d 394, 396 (1st Cir. 1968) (transmitting list of names and addresses to union for election purposes is not violation of § 302), *rev'd on other grounds sub nom., NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426 (1969), 22 L. Ed. 2d 709.

Apart from the plain language of section 302, the structure of other provisions of the labor law also militates against Sage's position. Issues of labor-unit recognition and bargaining are comprehensively regulated by the NLRA. Courts have repeatedly upheld labor-management agreements providing for arbitration over recognition disputes. *See, e.g., Hotel & Rest. Emples. Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993); *Hotel Emples., Rest. Emples. Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468 (9th Cir. 1992). Sage's interpretation of section 302 would wreak havoc on the carefully balanced structure of the laws governing recognition of and bargaining with unions. *Cf. Caterpillar*, 107 F.3d at 1056-57 (declining to read section 302 as invalidating benefits obtained under lawful collective bargaining).

Finally, Sage suggests that it is improper to "sacrifice" the employees' right to an election by reaching an agreement to resolve any card count by arbitration. Sage concedes,

however, as it must, that it lacks standing to assert employees' rights under the labor laws. Accordingly, we do not reach this contention.[11]

For the foregoing reasons, we will affirm the judgment of the District Court.

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[11] Sage's remaining claim on appeal is that the City's passage of Ordinance 22 and Resolution 45 violated its Home Rule Charter. Sage neglected to raise this affirmative defense in the District Court, and it is therefore waived. *Systems, Inc. v. Bridge Electronics Co.*, 335 F.2d 465, 466 (3d Cir. 1964).

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 02-1624
[Decided, September 29, 2003]

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,
Plaintiff,

v.

SAGE HOSPITALITY RESOURCES, L.L.C.,
Defendant.

JUDGES: Gary L. Lancaster, District Judge.

MEMORANDUM

Gary L. Lancaster,
District Judge.

This is an action for breach of contract. Plaintiff, Hotel Employees and Restaurant Employees Union, Local 57 ("Local 57"), allege that defendant Sage Hospitality Resources, L.L.C. ("Sage"), violated the arbitration clause of their Neutrality Agreement. Plaintiff seeks an order compelling defendant to arbitrate the dispute that has arisen

with regard to defendant's recognizing Local 57 as the collective bargaining unit for defendant's employees. Defendant argues that the Neutrality Agreement is illegal and void *ab initio*. The parties have filed cross-motions for summary judgment.

For the reasons discussed below, plaintiff's motion for summary judgment will be granted, defendant's motion for summary judgment will be denied, and the parties will submit their dispute to arbitration pursuant to the Neutrality Agreement.

I. BACKGROUND

Local 57 is a labor organization within the meaning of Section 5(2) of the National Labor Relations Act, 29 U.S.C. § 152(5). Sage operates the Pittsburgh Renaissance Hotel ("Hotel"). In 1998, Sage began plans to convert the Fulton Building in downtown Pittsburgh, Pennsylvania, into the hotel. As part of the financing for the project, Sage sought Tax Increment Financing ("TIF") from the Urban Redevelopment Authority of Pittsburgh. The TIF amounted to approximately $3.6 million. The City of Pittsburgh ("The City") is one of four bodies that make up the Urban Redevelopment Authority of Pittsburgh.

In January, 1999, the City adopted Resolution 45, which amended the City's participation in TIF by requiring Sage to enter into a "post-construction labor agreement" with a union to guarantee labor peace. In July, 1999, the City passed Ordinance 22, which required contractors and employers in the hospitality industry to enter into collective bargaining agreements when the City has a proprietary interest. On February 13, 2001, the City passed a resolution rescinding its

approval of the TIF agreement because Sage had not entered into an agreement under Resolution 45 and Ordinance 22.

On February 20, 2001, Local 57 and Sage signed the Neutrality Agreement, the validity of which is disputed in this case, to fulfill the requirements of Resolution 45. Sage contends that it only signed the agreement to avoid losing TIF. The Neutrality Agreement contains two provisions of interest to this case. First, it provided for a card check procedure under the City's oversight, whereby Local 57 would present cards requesting union representation signed by a majority of the Hotel's employees and Sage would provide a current list of Hotel employees and valid signature samples. Second, it provided an arbitration clause to resolve disputes arising under the Neutrality Agreement.

In June 2002, Local 57 requested the card check pursuant to the Neutrality Agreement. Sage refused to comply with the card check and also refused to arbitrate the matter pursuant to the arbitration clause.

II. STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides that summary judgment may be granted if, drawing all inferences in favor of the non-moving party, "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The mere existence of some factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. However, a dispute over those facts that might affect the outcome of the suit under the governing

substantive law, i.e., the material facts will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986), 91 L. Ed. 2d 202. Similarly, summary judgment is improper so long as the dispute over the material facts is genuine. *Anderson*, 477 U.S. at 248. In determining whether the dispute is genuine, the court's function is not to weigh the evidence or to determine the truth of the matter but only to determine whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248-49.

In summary, the inquiry under a Rule 56 motion is whether the evidence of record presents a genuine dispute over material facts so as to require submission of the matter to a jury for resolution of that factual dispute or whether the evidence is so one-sided that the movant must prevail as a matter of law.

III. DISCUSSION

The parties agree that there are no factual disputes in this case and that the dispute is ripe for resolution. Similarly, the parties do not dispute that the contract, if valid, requires defendant to arbitrate the card check dispute. Therefore, this case turns on whether the Neutrality Agreement was legal and, if so, whether Sage signed the Neutrality Agreement under economic duress.

Once parties have entered into a contract, the contract is enforceable "absent illegality, unconscionableness, fraud, duress, or mistake [.]" *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980). Defendant contends that the Neutrality Agreement was illegal because it overstepped provisions of the National Labor Relations Act ("NLRA").

Defendant first claims that the Neutrality Agreement is illegal under Section 7 of the NLRA, 29 U.S.C. § 157, because it interferes with the employees' statutory rights to choose their own collective bargaining agent or to refrain from such activities. Specifically, defendant argues that union organization must proceed under the procedure outlined in the NLRA, rather than the card check procedure detailed in the Neutrality Agreement.

The National Labor Relations Board ("NLRB") is generally granted primary jurisdiction over matters regarding labor relations, such as unfair labor practices and representation issues. *Hotel & Restaurant Employees Union, Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561, 564 (2d Cir. 1993). A union and an employer can, however, reach a private agreement to provide an alternative method of deciding union representation. *J. P. Morgan Hotel*, 996 F.2d at 566. In fact, card check procedures similar to the one disputed in this case have been upheld by other courts. See *Hotel Employees, Restaurant Employees Union, Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992); see also *Georgetown Hotel v. National Labor Relations Bd.*, 266 U.S. App. D.C. 371, 835 F.2d 1467 (D.C. Cir. 1987). In this case, the parties signed an agreement that allowed for union certification through an alternative method rather than the NLRB's election procedure. Because it was not illegal for them to do so, we cannot say that the contract was illegal under Section 7 of the NLRA.

Defendant also asserts that the Neutrality Agreement violated Section 302 of the Labor Management Relations Act, ("LMRA"), which provides that employers cannot agree to give, nor can the union demand that it be provided with, "things of value." Defendant contends that the Neutrality Agreement requires the union be provided with "things of

value;" specifically, (1) access to the hotel, (2) updated lists of employees and their home addresses, and (3) participation in the card check. Defendant also alleges that the provision of the Neutrality Agreement requiring that it refrain from making any statements, other than those that would be considered neutral to the union's presence, could be considered a "thing of value" in violation of LMRA. We find this argument meritless. Plaintiff correctly notes that the bribery and secrecy LMRA Section 302 sought to address are not at issue in this case. Defendant's reading of the statute is clearly out of context and irrelevant to the current matter.

Finally, the parties contest the legality of the City's actions in passing Ordinance 22, which requires evidence of labor peace as a contingency of the TIF. Defendant argues that such an action is preempted by the supremacy clause. Plaintiff, however, alleges that the City's actions were proper pursuant to the proprietor doctrine, as stated in *Building & Construction Trades v. Associated Builders & Contractors,* 507 U.S. 218, 227, 113 S.Ct. 1190 (1993), 122 L. Ed. 2d 565. (the "Boston Harbor" case). Because the legality of the City's actions is not dispositive in this case and because the City is not, itself, a party to this action, we need not decide this issue. Regardless of legality of the City's actions, we find that the decision in this case turns on the validity of the Neutrality Agreement itself, independent of Ordinance 22.

Because we find the contract to be legal, Sage must prove that the Neutrality Agreement is otherwise invalid. *Mellon Bank*, N.A., 619 F.2d at 1009. Sage alleges that the Neutrality Agreement is void because it was entered into under economic duress. This economic duress was allegedly caused by the City's threat to revoke its contribution toward the $3.6 million in TIF.

In order to raise the defense of duress, a party must prove three elements: (1) a wrongful threat; (2) fear that induces a loss of free will and judgment; and (3) that there was no immediate legal remedy available as an alternative to executing the agreement. *Warner-Lambert Pharmaceutical Co. v. Sylk*, 471 F.2d 1137, 1143 (3d Cir. 1972); *Levin v. Garfinkle*, 492 F. Supp. 781, 807 (E.D. Pa. 1980), aff'd, 667 F.2d 381 (3d Cir. 1981).

Defendant's assertion of economic duress amounts to little more than a conclusory statement without adequate support. Financial distress is not enough to necessitate a finding of economic duress. *See Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 911 (3d Cir. 1985). Also, there is a presumption under Pennsylvania law against finding duress where a party is free to consult with legal counsel. *Carrier v. Wm. Penn Broadcasting, Co.*, 426 Pa. 427, 233 A.2d 519, 521 (Pa. 1967). Defendant's own timeline of events proves that this case lacks the immediacy needed to find economic duress.

Furthermore, economic duress merely makes a contract voidable, not void. *Agathos v. Starlite Motel*, 977 F.2d 1500, 1506 (3d Cir. 1992). Even if economic duress could be shown at the time of formation, the undisputed facts of the case show that defendant never complained of duress until plaintiff attempted to procure defendant's participation in the card check. By remaining silent, defendant ratified the contract. A party cannot sit idly by and receive benefits under a contract and then later raise claims of economic duress. *Seal v. Riverside Savings Bank*, 825 F. Supp. 686, 696 (E.D. Pa. 1993) (citing *National Auto Brokers Corp. v. Aleeda Dev. Corp.*, 243 Pa. Super. 101, 364 A.2d 470, 476 (Pa. 1976)).

IV. CONCLUSION

For the reasons stated above, we find that defendant cannot avoid the Neutrality Agreement. Because the parties concede that the agreement, if valid, requires that the parties' dispute be resolved in arbitration, we find that plaintiff's requested order to compel arbitration should be granted. Plaintiff's motion for summary judgment is granted. Defendant's motion for summary judgment is denied. The parties are ordered to resolve their dispute through arbitration. The clerk shall mark the docket as closed.

BY THE COURT:
Gary L. Lancaster, J.

JUDGMENT ORDER

AND NOW, this 30th day of September, 2003, IT IS HEREBY ORDERED that judgment is entered in favor of plaintiff, Hotel Employees and restaurant Employees Union, Local 57, and against defendant, Sage Hospitality Resources, L.L.C.

BY THE COURT:

Gary L. Lancaster, J.

APPENDIX D

29 USC § 158 (A)

TITLE 29. LABOR

CHAPTER 7. LABOR-MANAGEMENT RELATIONS NATIONAL LABOR RELATIONS

§ 158. Unfair labor practices

(a) Unfair labor practices by employer. It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 USCS § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in

any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act [this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [29 USCS § 159(a)], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [29 USCS § 159(e)] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 USCS § 159(a)].

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents-

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USCS § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) [29 USCS § 159(a)];

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport,

or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is–

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e) [subsec. (e) of this section];

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [29 USCS § 159]: Provided, That nothing contained in this clause

(B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such

employees under the provisions of section 9 [29 USCS § 159];

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: Provided, further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services,

at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not

appropriately be raised under section 9(c) of this Act [29 USCS § 159(c)],

(B) where within the preceding twelve months a valid election under section 9(c) of this Act [29 USCS § 159(c)] has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) [29 USCS § 159(c)] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) [29 USCS § 159(c)(1)] or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b) [this subsection].

(c) Expression of views without threat of reprisal or force or promise of benefit. The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(e) Enforceability of contract or agreement to boycott any other employer; exception. It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection (e) and section 8(b)(4)(B) [subsec. (b)(4)(B) of this section] the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this Act shall prohibit the

enforcement of any agreement which is within the foregoing exception.

(f) Agreement covering employees in the building and construction industry. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsec. (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [29 USCS § 159] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsec. (a)(3) of this section]: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)
[29 USCS § 159(c) or (e)].

APPENDIX E

AN ORDINANCE

Supplementing the Pittsburgh Code, Title One, Administrative, Article VII, Procedures, Chapter 161, Contracts, by adding Section 161.30 --Requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements where the City of Pittsburgh has a financial or proprietary interest.

WHEREAS, The City of Pittsburgh has a financial or proprietary interest in certain capital projects which may include hospitality operations such as hotels; motels, restaurants, bars, clubs, and food and beverage operations. It is anticipated that the revenues generated by these operations will be used in part to defray the public costs incurred in the construction and maintenance of such capital projects as well as to fund lease, rental or license payments to the City. It is essential that these operations be conducted efficiently and without interruption and that no labor disputes affecting such operations may impact the revenues of other parts of such capital projects, which would in turn adversely affect the revenue stream to government. The City has found that the efficient and uninterrupted operation of hospitality services may be threatened by labor disputes, and has found the only way to avoid this problem is by requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements or other contracts under 29 U.S.C. sec. 185 (a) with respect to the employees who will staff hospitality operations in capital

projects, which contracts prohibit the union and its members, and in the case of collective bargaining agreements, all employees covered by such agreements, from engaging in picketing, work stoppages, boycotts or other economic interference with the business of said Contractors and Employers of hospitality operations or persons under contract to Contractors for the duration of the Contractors' or Employers' respective contracts with the City, and provide instead for alternative dispute resolution for all employment disputes including unresolved negotiations. Such contracts are the only method of insuring continuous provision of services under City contracts because under federal law, Employers may not unilaterally prohibit unions or their employees from engaging in work stoppages.

THE COUNCIL OF THE CITY OF PITTSBURGH HEREBY ENACTS AS FOLLOWS:

SECTION 1. The Pittsburgh Code, Title One, Administrative, Article VII, Procedures, Chapter 161, Contracts, is hereby supplemented by adding Section 161.30, as follows:

161.30 - Requiring Contractors and Employers of employees hired to staff hospitality operations to be signatory to collective bargaining agreements where the City of Pittsburgh has a financial or proprietary interest.

A. UNION CONTRACTS: NO WORK STOPPAGE: ARBITRATION

Each and every Contractor and Employer of employees hired to staff hospitality operations shall be or become signatory to valid collective bargaining agreements or other contracts under 29 U.S.C. Section 185 with any labor

organization seeking to represent Hospitality Workers employed in the Contractor's and/or Employer's Hospitality Operations in a Capital Project as a condition precedent to its contract with the City of Pittsburgh. Each collective bargaining agreement or contract must contain a provision prohibiting the labor organization and its members, and in the case of a collective bargaining agreement, all employees covered by the agreement, from engaging from any picketing, work stoppages, boycotts or any other economic interference with the Hospitality Operations of Contractor or any persons under contract to it for the duration of the time required for the repayment of public indebtedness incurred to finance the acquisition or development of such Capital Project, or for the duration of Contractor's contract or contracts with the City for the operation of such Capital Project, whichever period of time is more extensive (the "No-Strike Pledge"). Each agreement must provide that during this time period, all disputes relating to employment conditions or the negotiation thereof shall be submitted to final and binding arbitration. Each and every Contractor and Employer of employees hired to staff Hospitality Operations shall require that any work under its contract or contracts with the City to be done by the Contractor's or Employer's contractors, subcontractors, tenants or subtenants shall be done under collective bargaining agreements or other contracts under 29 U.S.C. Section 185 containing the same provisions as specified above. A contractor or Employer shall be relieved of the obligations of this section with respect to a labor organization if the labor organization places conditions upon its No-Strike Pledge that the City Council finds, after notice and hearing, to be arbitrary or capricious.

B. DEFINITIONS

(a) "Contractor" as used herein means any person party to a Contract.

(b) "Person" means and includes a sole proprietorship, partnership, corporation, joint venture or business organization of any kind.

(c) "Employer" means an employer of employees hired to staff or work at a Hospitality Operation.

(d) "Contract" means any contract, lease or license from the City to use any City property for the conduct of Hospitality Operations, or under any contract, lease or license pursuant to which the City is entitled to receive as rents, royalties or other income a percentage of the revenues of an enterprise, or any payments in connection with financing providing by or through the City, or any subcontract, sublease, sublicense or other transfer or assignment of any right, title or interest received from the City pursuant to any such contract, lease or license.

(e) "Hospitality Operations" means hotels or motels, providing lodging and other guest accommodations and restaurants, bars, clubs, cafeterias and food and beverage operations and does not include sport stadium operations.

(f) "Valid collective bargaining agreement" as used herein means a collective bargaining agreement entered into between the person contracting or subcontracting to provide services and a labor organization lawfully serving as the exclusive

collective bargaining representative for the employees who provide or will provide services pursuant to such a contract.

(g) "Contract under 29 U.S.C. Section 185" as used herein means a contract to which 29 U.S.C. Section 185 (a) applies, as that provision has been interpreted by the United States Supreme Court.

(h) "City" means the City of Pittsburgh, Pennsylvania,

(i) "City Council" means the City Council of the City.

(j) "Capital Project" has the same meaning as in Pennsylvania Senate Bill 10 P.N. 313.

(k) "Hospitality Workers" means all full-time or part-time employees in a Hospitality Operation, except supervisors, managers and guards.

C. SEVERABILITY

If any section or portion of a section of this agreement is declared illegal, invalid or inoperative, in whole or in part, by any court of competent jurisdiction, the remaining sections and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this ordinance.

SECTION 2. That any Ordinance or part of Ordinance, conflicting with the provisions of the Ordinance, be and the same is hereby repealed so far as the same affects this Ordinance.

Ordained and enacted into a law in ocuncil, this 27th day of July A.D. 1999

/s/_____
President of Council

Attest:/s/_____
Clerk of Council

Mayor's office August 6, 1999

/s/_____
Mayor

Attest:/s/_____
Mayor's Secretary

Recorded in Ordinance Book, Vol. 78 Page 332, 12th day of August 1999.

Effective Date: August 12, 1999

APPENDIX F

RESOLUTION

Repealing Bill No. 1020 entitled Adopting a Tax Increment Financing Plan presented by, the Urban Redevelopment Authority of Pittsburgh creating the Fulton Building Tax Increment Financing District, and making certain findings.

WHEREAS, on February 2, 1999, the City approved Bill No. 1020 Adopting a Tax Increment Financing Plan presented by the Urban redevelopment Authority of Pittsburgh creating the Fulton Building Tax Increment Financing District; and

WHEREAS, the Fulton Building Tax increment Financing Plan calls for the Urban Redevelopment Authority of Pittsburgh to issue a $3.56 million taxable note to assist Sage Hospitality Resources, LLC to convert the Fulton Building to a hotel; and

WHEREAS, the City has a proprietary interest in ensuring that the operation of the Fulton Building hotel be conducted efficiently and without interruption; and

WHEREAS, the efficient and uninterrupted operation of the Fulton Building Hotel may be threatened by labor disputes, adversely impacting the revenue stream to the City; and

WHEREAS, in order to protect the City's proprietary interest in the Fulton Building hotel project, Section 8 of Bill No. 1020 requires that Sage Properties - the developer of the Fulton Building - "enter into a post-construction certified

labor agreement with a bona fide labor organization recognized by the National Labor Relations Board"; and

WHEREAS, in August, 1999 the City passed Bill No. 22 which requires that hospitality operations in which the city of Pittsburgh has a finical or proprietary interest must obtain "precedent to its contract with the City of Pittsburgh" an agreement with a labor organization prohibiting the labor organization from engaging in "any picketing, work stoppages, boycotts or any other economic interference with the hospitality operations"; and

WHEREAS, Sage Properties has not reached an agreement with a labor union to ensure labor peace during the operation of the Fulton Building hotel, potentially threatening the City's proprietary interest in the project; and

WHEREAS, the City should repeal the Fulton Building Tax Increment Financing District until the City's proprietary interest in the project is fully protected; and

WHEREAS, Pennsylvania's Tax Increment Financing Act 53 P.S.§ 6930.8 provides that the governing body that created the TIF district may dissolve the district at any time as long as no tax increment bonds or notes for the district remain outstanding;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF PITTSBURGH AS FOLLOWS:

Bill No. 1020 entitled Adopting a Tax Increment Financing plan presented by the Urban Redevelopment Authority of Pittsburgh creating the Fulton Building Tax Increment Financing District is repealed in its entirety.

Sponsored by _____ Gene Ricciardi, Alan Hertzberg and Michael Diven

APPENDIX G

MEMORANDUM OF AGREEMENT

THIS AGREEMENT is made and entered into by and between SAGE HOSPITALITY RESOURCE, L.L.C. d/b/a the Renaissance Fulton Hotel and Fulton Hotel Developer, LLLP (hereinafter collectively referred to as the "Employer") and the Hotel Employees & Restaurant Employees Union, Local 57, AFL-CIO (the "Union").

1. The Agreement shall cover all full-time and part-time employees employed in classifications listed in Exhibit A, or in classifications called by different names when performing similar duties (referred to hereinafter as "Employees") at the hotel to be located at the former Fulton Building, tax parcel 18-S-68, in Pittsburgh, Pennsylvania (hereinafter referred to as the "Hotel") which during the term of the Agreement is owned, by, operated by or substantially under the control of the Employer. The term "Employer" shall be deemed to include any person, firm, partnership, corporation, joint venture or other legal entity substantially under the control of: (a) the Employer covered by this Agreement; (b) one or more principal(s) of the Employer covered by this Agreement; (c) a subsidiary of the Employer covered by this Agreement; or (d) any person, firm, partnership, corporation, joint venture or other legal entity which substantially controls the Employer covered by this Agreement.

2. The parties hereby establish the following procedure for the purpose of ensuring an orderly environment for the exercise by the Employees of their rights under Section 7 of

the National Labor Relations Act and for the Union to avoid picketing and/or other economic action directed at the Employer in the event the Union decides to conduct an organizing campaign among Employees.

3. The parties mutually recognize that the National Labor Relations Act guarantees employees the right to form or select any labor organization to act as their exclusive representative for the purpose of collective bargaining with their Employer, or to refrain from such activity.

4. During the term of this Agreement, the Employer and the Union agree to the following neutrality provisions. The Employer will not do any action or make any statements that will directly or indirectly state or imply any opposition by the Employer of the Union as the collective bargaining agent of the Employees, or preference for or opposition to any particular union as a bargaining agent. The Union shall likewise not conduct a campaign that demeans or disparages the integrity or character of the Employer or its representatives.

5. The Union and its representatives will not coerce or threaten any Employee in an effort to obtain authorization cards.

6. The authorization cards provided to Employees to determine whether they wish to choose the Union as their exclusive representative for the purpose of collective bargaining with their Employer shall contain the following paragraph: "My decision to authorize the Union to act as my exclusive representative for the purpose of collective bargaining with my Employer was done so freely, without threat or coercion by the Union. In addition, I understand that if I believe that I was coerced or threatened by the Union, I

may contact _____ *[insert name]*, a representative of the Mayor of Pittsburgh at _____ *[insert phone number]* to report such allegations. I also understand that I may revoke my authorization of the Union to act as my exclusive representative for the purpose of collective bargaining by sending a signed letter to _____ *[insert name]* at the Mayor of Pittsburgh's office." This paragraph must be initialed by the Employee for purposes of the Union requesting recognition as the exclusive collective bargaining agent for such Employees under Paragraph 11.

7. Whenever the Employer finds it necessary to hire new Employees for vacancies in job classification covered by this Agreement at the Hotel, and the Employer begins to hire such Employees, the Employer shall give written notice to the Union that such employment has commenced. The Union may furnish applicants for such position specified in this Agreement. When requesting applicants, the Employer shall state the qualifications applicants are expected to possess. The Unions's selection of applicants for referral shall be on a non-discriminatory basis and shall not be based upon or in any way affected by membership in the Union of the Union's bylaws, rules, regulations, constitutional provisions, or any other aspects or obligation of Union membership policies or requirements, or upon personal characteristics of an applicant where discrimination based upon such characteristics is prohibited by law. The Employer agrees that any interest demonstrated by an applicant in joining the Union shall not constitute grounds for discriminatory or disparate treatment nor adversely impact the applicant's ability to be hired by the employer. However, the Union agrees that the Employer shall be the sole judge of an applicant's suitability, competence and qualifications to perform the work of any job to be filled.

8. Anytime on or after April 1, 2001, the Union may request, and the Employer shall provide, access to its premises and to such Employees by the Union at **reasonable times and dates as mutually agreed to by the parties in the second or third floor meeting rooms** to maximize Employee access. **Access shall exclude access to the employee lunchroom and break areas except to announce the union meetings**. Subsequent to said request for access, the Employer shall provide a minimum of six hours access to the Union per week with a maximum of two hours per shift for a period of 120 days following such request for access. **In no event shall access exceed six hours or six visits per week.** Thereafter, the Employer shall provide a minimum of six hours access per each subsequent three month period over the duration of the agreement. The Union shall provide notice of the times and dates it will require access by 12:00 p.m. Friday of the week prior. The Union may **only** engage in organizing efforts at the Hotel during Employees' non-working times (before work, after work, and during meals and breaks). The Union agrees that it will not interfere or disrupt in any way the Employer's operations while on the Employer's premises or at any time during the term of this Agreement.

9. During any campaign to seek certification as the bargaining representative for the Employees at the Hotel, the Employer will provide a bulletin board for the Union of a size not less that 2' x 3' in a non-public area convenient to all such Employees.

10. On March 12, 2001 the Employer will furnish the Union with a complete list of Employees, including both full and regular part-time Employees, showing job classifications, departments and home addresses. Thereafter, the Employer will provide updated complete lists monthly.

11. The Union may request recognition as the exclusive collective bargaining agent for such Employees in accordance with the following procedures. Any time after May 1, 2001, the Union may seek to be certified as the exclusive bargaining agent of the Employees. To establish that it represents a majority of the Employees employed in the classifications listed in Exhibit A, the Union agrees to submit the authorization and membership cards to *[fill in official name]*, a City of Pittsburgh official designated by Mayor Murphy and agreed to by the Employer and the Union (hereinafter referred to "City of Pittsburgh Official"). These authorization and membership cards must be dated after the beginning of the hiring process at the Hotel. At that time, the Employer will provide the City of Pittsburgh Official with a list of all Employees employed in the classifications listed in Exhibit A **plus the employee's hours worked to determine if they are full time or regular part-time employees eligible to participate in the card check**. This City of Pittsburgh Official shall determine based upon this list and an examination of the Employees' signatures **and hours worked** whether the Union has authorization and membership cards signed by a simple majority of those Employees, taking into account any letters to the City of Pittsburgh Official signed by Employees revoking their prior authorizations. If this process establishes that a majority of such Employees has designated the Unions as their exclusive collective bargaining representative or joined the Union, the Employer will recognize the Union as such representative of such Employees. The Employer will not file a petition with the National Labor Relations Board for any election in connection with any demands for recognition provided for in this agreement. The Union and the Employer will not file any charges with the National Labor Relations Board in connection with any act or omission occurring within the

context of this agreement; arbitration under Paragraph 15 shall be the exclusive remedy.

12. During the life of this Agreement, the Union will not engage in picketing or other economic activity at the Hotel, and the Employer will not engage in a lockout of the employees. This paragraph will expire with respect to any group of Employees upon recognition of the Union as the representative of such Employees pursuant to paragraph 11. Notwithstanding the termination provision above, if the Employer recognizes any union besides Union as the exclusive collective bargaining representative of Employees, or any of them, this paragraph shall terminate immediately and without notice.

13. In the event that the Employer sells, transfers, or assigns all or any part of its right, title, or interest in the Hotel or substantially all of the assets used in the operation of the Hotel, or in the event there is a change in the form of ownership of the Employer, the Employer shall give the prospective purchaser, transferee, assignee, owner, notice of this agreement.

14. The Employer shall incorporate the entirety of paragraphs 4,7, 8, 10, 11, and 12 of this of Agreement in any contract, subcontract, lease, sublease, operating agreement, franchise agreement or any other agreement or instrument giving a right to any person to operate any enterprise in the Hotel employing employees in classifications listed in Exhibit A, or in classifications called by different names when performing similar duties, and shall obligate any person taking such interest, and any and all successors and assigns of such person, to in turn incorporate said paragraphs in any further agreement or instrument giving a right as described above. The Employer shall enforce such provisions, or at its option

assign its rights to do so to the Union. The Employer shall give the Union written notice of the execution of such agreement or instrument and identify the other party(ies) to the transaction within 15 days after the agreement or instrument is signed. The terms "Employer" and "Hotel" shall be modified in such agreement or instrument to conform to the terminology in such agreement or instrument but retain the same meaning as in this Agreement, and the terms "Employer" and "Employees" as used herein shall be modified to refer, respectively, to the person or persons receiving a right to operate an enterprise in the Hotel and the employees of such person or persons.

15. The parties agree that any disputes over the interpretation or application of this Agreement shall be submitted to expedited and binding arbitration, with John J Morgan serving as the arbitrator. If he is unavailable to serve within fourteen (14) calendar days of notification then **Donald P. McPherson**, or another mutually acceptable arbitrator shall be selected. The arbitrator shall have the authority to interpret this agreement and apply NLRB law for which no specific provision has been made for in this Agreement. The arbitrator shall also have the authority to order the non-compliant party to comply with this Agreement. The parties hereto agree to comply with any order of the arbitrator, which shall be final and binding, and furthermore consent to the entry of any order of the arbitrator as the order or judgment of the United States District Court for the Western District of Pennsylvania without entry of findings of fact and conclusions of law.

16. This Agreement shall be in full force and effect from the date it is fully executed on behalf of the Employer and the Union until 30 months from the full public opening of the Hotel, or if sooner upon execution of a collective bargaining agreement.

IN WITNESS WHEREOF, the parties hereto by their duly designated representatives have hereunto set their hands.

FOR THE EMPLOYER:

Sage Hospitality Resources, LLC
d/b/a the Renaissance Fulton Hotel

By: /s/_____
Its: /s/_____
Date: 2/21/01

Fulton Hotel Developer, LLLP

By: /s/_____
Its: /s/_____
Date: 2/21/01

FOR THE UNION:

Hotel Employees & Restaurant Employees Union,
Local 57, AFL-CIO

By: /s/_____
Its: President
Date: February 21, 2001

EXHIBIT A

All regular full-time and regular part-time hotel service, housekeeping, food and beverage, and laundry employees (including room cleaners, house persons, door person, bell persons, telephone operators, kitchen employees, servers, bussers, bartenders, banquet employees, cashiers, hosts, concierges, valets, laundry workers, front desk, and recreational employees) employed by the Employer at the Hotel, but excluding all secretarial, office clerical, sales, and maintenance employees, parking valets/attendants, and all managers, supervisors, and guards as defined in the National Labor Relations Act.

Regular full-time is defined as an associate who is normally scheduled to work at least 30 hours per week. Full-time associates are eligible for company benefits.

Regular part-lime associates is defined as an associate who is schedule to work less than a 30-hour workweek **but has worked at least 60 hours during the preceding calendar quarter and has worked in at least 9 weeks of said quarter. The Employer acknowledges this rule fairly represents those part-time employees who have a reasonable expectation of continued employment and should be deemed eligible to participate in the representation process described in Paragraph 10 above. Other part-time associates are not eligible for company benefits. For the first 45 days the Union may organize the regular part-time employees who will be eligible to sign a card to support union recognition. Eligible employees will be those part-time employees who are scheduled to work less that a 30 hour work week but have worked at least 30 hours during the preceding 45 calendar days and have worked in at least 5 weeks during this period.**

MOTION FILED

APR 1 1 2005

(3)

No. 04-1216

IN THE

SUPREME COURT OF THE UNITED STATES

SAGE HOSPITALITY RESOURCES, LLC,
Petitioner,
v.
HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE JOINT BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION AND BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITION

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
National Chamber
Litigation Center, Inc.
1615 H St., N.W.
Washington, D.C. 20062
202-463-5337

Maurice Baskin
(Counsel of Record)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Counsel for *Amici Curiae*

MOTION FOR LEAVE TO FILE JOINT BRIEF OF AMICI CURIAE

The Chamber of Commerce of the United States, Associated Builders and Contractors, Inc., and the Society for Human Resource Management (the "*Amici*") hereby move pursuant to Rule 37.2(b) for leave to file a joint Brief of *Amici Curiae* in support of the Petition in the above captioned matter. In accordance with the Court's Rule, the proposed *amicus* brief is attached to this Motion and made part of the same document.

Prior to filing this Motion, the *Amici* requested consent from the parties for the filing of the joint amicus brief. The Petitioner consented to the filing of the proposed amicus brief, but the Respondent withheld consent.

As grounds for the Motion, the *Amici* assert as follows:

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Associated Builders and Contractors, Inc. (ABC) is a national trade association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom perform

work on government-sponsored economic development projects.

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. Founded in 1948, SHRM represents more than 190,000 individual members and serves the needs of HR professionals by providing essential and comprehensive resources and by ensuring that HR is recognized as an essential partner in developing and executing organizational strategy.

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Third Circuit. The Third Circuit failed to appreciate the potentially staggering impact of its decision on private employer labor relations throughout the United States, due to the pervasive nature of government-sponsored economic development programs all over the country, similar in scope and effect to the Pittsburgh City Ordinance. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici* have broader familiarity than either of the parties with tax incentive financing (TIF) and other widespread forms of economic development programs utilized by state and local governments everywhere in the United States.

The City Ordinance upheld below broadly imposes collective bargaining obligations on private employers, in direct contravention of the NLRA. As a result of the Third Circuit's decision, private businesses nationwide will be in jeopardy of losing their rights to freedom of contract previously protected by federal labor law. By expanding this Court's "market participant" doctrine beyond the narrow confines of the construction industry and into the inherently regulatory practice of tax increment financing, the Third

Circuit's decision threatens interference with the protected rights of countless private employers and their employees.

Wherefore, the Motion for leave to file the joint brief of *Amici Curiae* in support of the Petition should be granted.

Respectfully submitted,

Maurice Baskin
(Counsel of Record)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
National Chamber
Litigation Center, Inc.
1615 H St., N.W.
Washington, D.C. 20062
202-463-5337

Counsel for *Amici Curiae*

No. 04-1216

IN THE
SUPREME COURT OF THE UNITED STATES

SAGE HOSPITALITY RESOURCES, LLC,
Petitioner,
v.
HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Third Circuit

BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES, ASSOCIATED BUILDERS AND CONTRACTORS, INC., AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF THE PETITION

Maurice Baskin
(Counsel of Record)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Stephen A. Bokat
Robin S. Conrad
Robert J. Costagliola
National Chamber
Litigation Center, Inc.
1615 H St., N.W.
Washington, D.C. 20062
202-463-5337

Counsel for *Amici Curiae*

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INTERESTS OF THE AMICI [1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

Associated Builders and Contractors, Inc. ("ABC") is a national trade association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms, many of whom have performed work on government-sponsored economic development projects.

The Society for Human Resource Management ("SHRM") is the largest human resource management association in the world. Founded in 1948, SHRM represents more than 190,000 individual members and serves the needs of HR professionals by providing essential and comprehensive resources and by ensuring that HR is recognized as an essential partner in developing and executing organizational strategy.

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[1] Pursuant to Supreme Court Rule 37.6, the Amici state that this brief was not prepared, written or produced by any person or entity other than the Amici or their counsel.

The *Amici* are jointly filing this brief in support of the Petition in order to bring to this Court's attention the serious threat to the balance of interests under federal labor law presented by the decision of the Third Circuit. The Third Circuit failed to appreciate the potentially staggering impact of its decision on private employer labor relations throughout the United States, due to the pervasive nature of government-sponsored economic development programs all over the country, similar in scope and effect to the Pittsburgh City Ordinance. The *Amici's* brief will assist the Court in reviewing the issues raised by the Petition, because the *Amici* have broader familiarity than either of the parties with tax incentive financing (TIF) and other widespread forms of economic development programs utilized by state and local governments everywhere in the United States.

The City Ordinance upheld below broadly imposes collective bargaining obligations on private employers, in direct contravention of the NLRA. As a result of the Third Circuit's decision, private businesses nationwide will be in jeopardy of losing their rights to freedom of contract previously protected by federal labor law. By expanding this Court's "market participant" doctrine beyond the narrow confines of the construction industry and into the inherently regulatory practice of tax increment financing, the Third Circuit's decision threatens interference with the protected rights of countless private employers and their employees.

SUMMARY OF ARGUMENT

The Third Circuit's ruling that governmental economic development programs such as tax increment financing (TIF) are exempt from labor law preemption significantly undermines the Congressional policies underlying the National Labor Relations Act, by allowing state and local governments to impose regulatory labor policies on large numbers of private employers and employees under the guise of maintaining "proprietary" interests.

This Court's "market participant" exemption from labor law preemption has never been applied so broadly as in the present case. The Third Circuit appears not to have fully appreciated the pervasiveness and scope of the many business development programs potentially impacted by its decision upholding the Pittsburgh ordinance. The form of development program at issue in this case, tax increment financing (TIF), is utilized throughout the country and impacts many billions of dollars of economic development. By characterizing TIFs and similar business development programs as exempt from NLRA preemption, the Third Circuit has in effect removed large numbers of private employers and their employees from the protections of the Act, in a manner never intended by Congress.

Among the most important rights of employers and their employees under the NLRA, long recognized by this Court, are the right to bargain collectively only with those unions selected as the majority representative of the employees, and the right to bargain in good faith without reaching an agreement imposed by any outside agency. The ordinance at issue in the present case plainly abrogates those rights in a manner fundamentally at odds with federal labor law.

The Fifth Circuit, the Ninth Circuit, and this Court have all held that the market participation exemption is limited to circumstances in which a government entity is acting in the same manner as a private employer. In the circumstances of the present case, however, no private developer outside the construction industry would ever be permitted to impose a union agreement requirement on another private employer. By expanding the holding of this Court's *Boston Harbor* decision beyond the narrow circumstances of the construction industry, the Third Circuit has ignored the previous holdings of this Court and the language and history of Sections 8(d), (e) and (f) of the NLRA.

The Third Circuit has misapplied the limited *Boston Harbor* exemption from labor law preemption and has failed to apply the "comparable private action" test developed in the Fifth and Ninth Circuits. As a result, the Third Circuit's decision threatens massive disruption of the careful balance of interests established by federal labor law. The Petition should be granted so that this Court can clarify the scope of the market participation exemption from labor law preemption and return this Court's doctrine to its previous narrow boundaries.

REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS AN ISSUE OF GREAT IMPORTANCE TO THE BUSINESS COMMUNITY: THE UNPRECEDENTED AND IMPROPER EXPANSION OF THIS COURT'S NARROW "MARKET PARTICIPANT" EXEMPTION FROM LABOR LAW PREEMPTION.

A. The Third Circuit Failed To Appreciate The Broad Impact of Government-Sponsored Economic Development Programs On Private Sector Employers and Employees.

Many billions of dollars are spent annually by both state and local governments throughout the country on business development incentive programs. *See* Lockie, *Economic Development Incentive Wars*, www.cba.uni.edu9economics (2004); *see also* Corporation for Enterprise Development, *Ten Questions on Development Incentives*, www.cfed.org (2002). The past quarter century in particular has witnessed explosive growth in such economic development incentive programs, so that "today, every state in the union and nearly every large city in the country have established an economic development department or a public-private partnership with the mission of economic development." Lockie, *supra*, at 24.

Government-sponsored economic development programs take many forms:

- One-time deals negotiated with a specific firm, such as a property tax exemption;

- Grants and loans provided under programs that receive annual state appropriations, where a firm must apply for funding;
- Programs with established parameters and limits but with some degree of local government discretion allowed, including property tax abatements and tax increment financing districts;
- Tax incentives that function as entitlements, such as enterprise tax zones;
- Features of the tax code that favor certain forms of businesses, such as exemptions for inventories, fuel or utilities.

See Fisher and Peters, *Competition Among American States and Cities* (Upjohn Institute 1997).

As can be seen from the above list, most of these business development financing schemes, like Pittsburgh's TIF ordinance, involve the application of, or exemption from, **tax laws**, an inherently regulatory function of government. *See Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 592-3 (1997) ("[A]ssessment and computation of taxes is a primeval governmental activity"); *see also Associated Builders and Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73 (D. R.I. 200) (finding preemption of TIF-financed union requirements).

Another common feature of business development financing, as practiced in Pittsburgh and elsewhere, is that governments use such programs to encourage **private** economic development, without the government itself taking ownership of the projects at issue. Thus, in none of the program examples listed above does the government typically become the "proprietor" of the business or project being developed. Rather, the government is seeking through tax incentive programs to attract more *private* (tax paying)

businesses to locate within the local government's jurisdiction.

When properly implemented, such business development programs benefit both state and local governments and the private sector as well, and should be encouraged. At the same time, governmental economic development programs have tempted increasing numbers of state and local governments to use their financial resources in coercive ways, and to engage in unprecedented regulatory intrusion into the private business world. Such intrusion is inconsistent with rights previously protected under federal labor law for both employers and employees in the private sector, and is reflected not only in the present case, but in ongoing litigation in other circuits. *See Chamber of Commerce v. Lockyer*, 364 F. 3d 1154 (9th Cir. 2004) (petition for rehearing en banc pending) (rejecting state attempt to prohibit state contractors from exercising rights protected by NLRA); *Metropolitan Milwaukee Assn of Commerce v. Milwaukee County*, Case No. 01-C-0149 (E.D. WI 2005) (appeal pending) (forcing private nursing home operators to waive NLRA election procedures and other protected rights); *Northern IL Chapter Builders v. Lavin*, Case No. 04-C-50357 (N.D. IL March 24, 2005) (forcing private renewable fuel plant owners receiving state assistance to adopt union agreements)

The Third Circuit's characterization of government-sponsored business development programs as "proprietary" or "market participation" for purposes of exempting such governmental conduct from labor law preemption, deprives those terms of their true meaning. The Third Circuit's decision also gives no sense of comprehending the pervasiveness of the governmental conduct being exempted by this decision from the protections of federal labor law. The results of exempting so much government assisted activity from federal labor law preemption will truly be

staggering; indeed, a substantial percentage of the entire private sector business community will be adversely affected by this decision. No justification exists for granting state and local governments *carte blanche* to use their economic development programs as weapons undermining the federally-protected rights of so many private employers and their employees under the NLRA.

B. The Third Circuit Grossly Erred In Its Analysis Of Federal Labor Law Preemption.

The National Labor Relations Act protects the right of employers to enter into agreements with labor unions only on a voluntary basis, as a result of good faith bargaining in a manner regulated by the National Labor Relations Board. Neither the NLRB nor any private employer outside the construction industry is permitted to force another private employer to enter into any involuntary agreement with a union. *See H.K. Porter, Inc. v. NLRB*, 397 U.S. 99 (1970)(citing Section 8(d) of the Act). *See also Connell Construction Co. v. Plumbers and Pipefitters Local 100*, 421 U.S. 616 (1975) (explaining Section 8(e)'s prohibition against so-called "hot cargo" agreements outside the construction industry). Employees likewise have the right not to be forced to accept representation by unions who have not achieved majority support or to be subject to imposition of collective bargaining agreements in the absence of majority union representation, under Sections 7, 8 and 9 of the NLRA. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 307 (1974).

In the present case, Pittsburgh's ordinance requires that private, non-construction industry employers operating hotels, restaurants, bars, clubs, cafeterias, or other food and beverage operations sign collective bargaining agreements

with a union, or other agreements relating to issues relating to union recognition and bargaining, as a condition of receiving any form of financial assistance (including tax incentives) from the City. Neither the NLRB nor any private entity would be entitled to impose such a requirement on employers or employees under the NLRA.

Under both *Garmon* preemption (*San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959)) and *Machinists* preemption (*Lodge 76, International Assn of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976)), the Third Circuit should have found that the Pittsburgh ordinance is preempted by the NLRA. The ordinance plainly regulates activity that the NLRA protects, prohibits, or arguably protects or prohibits within the meaning of *Garmon*, and further regulates conduct that Congress intended to be left unregulated under the holding of *Machinists*. *See also Wisconsin Dept of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986); and *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) ("A local government, as well as the National Labor Relations Board, lacks the authority to "introduce some standards of properly 'balanced' bargaining power ... or to define what economic sanctions might be permitted negotiating parties in an ideal or balanced state of collective bargaining.")

In *Bldg. & Const. Trades Council v. Associated Builders and Contractors of Mass./R,.I., Inc.*, 507 U.S. 218, 230 (1993) ("*Boston Harbor*"), this Court recognized a narrow exemption from labor law preemption in the unusual circumstance where a state authority engaged in conduct that any private entity could also engage in, specifically in the construction industry. When the Massachusetts Water Resource Authority entered into a project labor agreement for a large construction project, the Court found that this was a type of agreement common to the construction industry and

was expressly authorized for private construction employers by Sections 8(e) and 8(f) of the NLRA. These sections of the Act permit "employers in the construction industry" and *only* such employers, to require subcontractors to enter into union agreements as a condition of performing work on a particular construction project. Under these unique circumstances, the Court upheld the project agreement "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find...." 507 U.S. at 233.

By expanding the market participant doctrine beyond the construction project circumstances present in *Boston Harbor*, the Third Circuit ignored the language and history of Sections 8(e) and (f) of the NLRA. The NLRA does not permit anyone other than an "employer in the construction industry" to enter into union-only subcontracting arrangements with labor unions. Private owner-developers do not typically enter into such arrangements; and they are *prohibited* from doing so under the NLRA unless they are in fact employers in the construction industry.

The Supreme Court has held that Congress intended the construction industry proviso of Section 8(e) to preserve only "the pattern of collective bargaining" that existed in the construction industry when Section 8(e) was enacted in 1959. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 657 (1982); *Connell Construction Co., Inc. v. Plumbers and Steamfitters, Local 100*, 421 U.S. 616, 627-33 (1975). *See* 105 Cong.Rec. 16414 (1959)(remarks of Sen. Kennedy), *reprinted in*, 2 Leg.Hist. at 1432. Recognizing Congress' intent, the Supreme Court held that questions concerning the scope of the proviso are completely controlled by "Congress'

perceptions regarding the [pre-1959] status quo in the construction industry."

The legislative history of Section 8(e) further demonstrates that Congress intended the phrase "employer in the construction industry" to refer only to construction contractors. Senator Kennedy and other prominent members of Congress used the phrases "employer in the construction industry" and "contractor in the construction industry" interchangeably. 105 Cong.Rec. 16415 (remarks of Sen. Kennedy) 2 Leg.His. at 1433; 105 Cong.Rec. at 16635 (remarks of Rep. Thompson), *reprinted in* 2 Leg.Hist. at 1720. Congressional debates concerning the propriety of "hot cargo" agreements in the construction industry focused exclusively on agreements between unions and "contractors," "prime contractors" or "general contractors." *Id.* (noting Congress' intent to preserve the right of "unions and prime contractors in construction industry to enter into [hot cargo] agreements"); *id.* at 8359 (remarks of Sen. Goldwater), *reprinted in* 2 Leg.Hist. at 1829-30 ("a building trades union may enter into a contract with a contractor – building contractor – whereby he agrees that he will not let work to any subcontractor who is nonunion").[2]

The legislative history of Section 8(f) even more clearly demonstrates that the "pattern of collective bargaining" that Congress perceived (and intended to preserve) was a pattern of agreements between unions and construction contractors, not owner-developers. Congress perceived the employers involved in this "pattern of collective bargaining" to include only those who: (1) submit

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[2] *See also* 105 Cong.Rec. App. 8141 (remarks of Sen. McNamara), *reprinted in*, 2 Leg.Hist. at 1815; *id.* at 8222 (remarks of Rep. Thompson), *reprinted in*, 2 Leg.Hist. at 1816.

bids or proposals to construct improvements to real property; (2) enter into prime construction contracts (with owner-developers) or construction subcontracts (with prime contractors); and (3) perform work requiring the employment of "skilled craftsmen." Private owner-developers rarely, if ever, engage in these activities.

In the present case, the Pittsburgh ordinance ranges far beyond the construction industry in its collective bargaining mandate. The ordinance expressly applies to employers operating hotels, restaurants, bars, clubs, cafeterias, or other food and beverage operations. It is undeniable that such employers are outside the narrowly permitted scope of Sections 8(e) and 8(f).

Had the Third Circuit applied the two-part preemption test derived from *Boston Harbor* that was set forth in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686, 693 (5th Cir. 1999), and in *Chamber of Commerce v. Lockyer*, 364 F. 3d. 1154 (9th Cir. 2003), then the Pittsburgh ordinance would plainly have been found to be preempted.[3]

Here, the Pittsburgh ordinance does not deal at all with the "efficient procurement of needed goods and services" described in *Cardinal Towing*, but is instead a tax measure. The ordinance also fails to satisfy the exemption standard "by comparison with the typical behavior of private

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[3] In *Cardinal Towing*, the Fifth Circuit adopted the following preemption standard: "First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?"

parties in similar circumstances." As noted above, no private party would be permitted under the NLRA to force a non-construction employer to recognize and/or enter into a collective bargaining agreement with any union. Finally, the Pittsburgh ordinance is not at all "narrow in its scope" under the *Cardinal Towing* test. Rather, the ordinance broadly imposes union requirements on non-construction industry employers and employees for reasons having nothing to do with any specific proprietary interest or specific project of the City.

Pittsburgh's ordinance must therefore be preempted because it conflicts with the Board's established policies for effectuating free and fair choice by employees with respect to union representation, and with Congress' purpose in making a Board forum available to employees, employers, and unions who are caught up in resolving questions concerning representation. Contrary to the finding of the Court of Appeals in this case, because the Pittsburgh ordinance is directed at employers hired to staff the operations of hotels, motels, restaurants, clubs, cafeterias and food and beverage operations – as opposed to construction industry employees – there is no exception from preemption doctrine that would even arguably allow the City of Pittsburgh to intrude on federal labor policy. The ordinance also should have been found preempted, as further noted above, because no private developer is able to manipulate the tax system to support its cash flow, as the City has done, and the interests of the City in developing its tax base through the TIF program are fundamentally regulatory in nature.

It is vital that this Court grant the Petition so that the numerous errors of the Third Circuit with regard to federal labor law preemption can be corrected. This is an issue of great public importance, and the failure to reverse the Third Circuit's decision will cause great harm to the federal labor law balance of interests nationally.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

Maurice Baskin
(Counsel of Record)
Venable LLP
575 7th St., N.W.
Washington, D.C. 20004
202-344-4823

Stephen A. Bokat
Robert J. Costagliola
National Chamber
Litigation Center, Inc.
1615 H St., N.W.
Washington, D.C. 20062
202-463-5337

Counsel for *Amici Curiae*

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No. 04-1216

IN THE

Supreme Court of the United States

SAGE HOSPITALITY RESOURCES, LLC,

Petitioner,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE,* AND BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., FAITH JETTER, AND DAVID HARLICH IN SUPPORT OF PETITIONER

Glenn M. Taubman*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
*Counsel of Record for *Amici Curiae*

April 2005

IN THE

Supreme Court of the United States

No. 04-1216

SAGE HOSPITALITY RESOURCES, LLC,

Petitioner,

v.

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE,* AND BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., FAITH JETTER, AND DAVID HARLICH IN SUPPORT OF PETITIONER

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

The National Right to Work Legal Defense Foundation, Inc. ("Foundation"), Faith Jetter, and David Harlich hereby move

for leave to file the accompanying brief as *amici curiae* in support of the Petitioner.[1] The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' rights to refrain from joining or supporting labor organizations. These cases include *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements, which are the subject of this litigation. *See Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 225 F.R.D. 204 (N.D. Ohio 2004).

Faith Jetter and David Harlich ("Employees") are employed by the Petitioner, Sage Hospitality Resources ("Sage"), working as a housekeeper and bartender, respectively. The "neutrality and card check" agreement which the City of Pittsburgh forced upon Sage grants the Hotel Employees and Restaurant Employees Union, Local 57 ("HERE") several exclusive privileges and powers that enable it—above all other unions—to become the Employees' collective bargaining representative. By filing the accompanying brief as *amici curaie*, Employees Jetter and Harlich seek to protect their right to refrain under § 7 of the National Labor Relations Act, 29 U.S.C. § 157.

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[1] *Amici* sought the consent of all parties to file this brief. Petitioner granted its consent, but Respondent refused.

For these reasons, the *Amici* respectfully move for leave to file the accompanying brief in support of the Petitioner.

Respectfully submitted,

Glenn M. Taubman*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

*Counsel of Record for *Amici Curiae*

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BRIEF *AMICI CURIAE* OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., FAITH JETTER, AND DAVID HARLICH IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI*[1]

The Foundation is a charitable, legal aid organization formed to protect the Right to Work, freedoms of association and speech, and other fundamental liberties of ordinary working men and women from infringement by compulsory unionism. As such, the Foundation aids employees who have been denied or coerced in the exercise of their right to refrain from collective activity. The Foundation's staff attorneys have served as counsel to individual employees in many Supreme Court cases involving employees' right to refrain from joining or supporting labor organizations, and thereby have helped to establish important precedents protecting employee rights in the workplace against the abuses of compulsory unionism. These cases include: *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991); *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

Most recently, the Foundation's legal aid program has been at the forefront of exposing the true nature of so-called "neutrality and card check" agreements. *See Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP*, 225 F.R.D. 204 (N.D. Ohio

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[1] *Amici* state that this brief was not prepared, written, or produced by any person or entity other than the *Amici* or their counsel, pursuant to Supreme Court Rule 37.6.

2004). Under these agreements, employers and unions strike secret deals to herd employees into unionization, often waiving National Labor Relations Board ("NLRB")–supervised secret–ballot elections and pressuring employees into signing union authorization cards which are counted as "votes" in favor of unionization. These agreements strike at the heart of employees' § 7 right to choose unionization or to *refrain*. The Foundation and its supporters want to ensure that this Court, as it considers the instant Petition for Writ of Certiorari, understands the manner in which these "neutrality and card check" agreements are created, enforced, and abused to hinder employees in the exercise of their § 7 rights.

Faith Jetter and David Harlich ("Employees") are employed by the Petitioner, Sage Hospitality Resources ("Sage"), working as a housekeeper and bartender, respectively. The "neutrality and card check" agreement which the City of Pittsburgh forced upon Sage grants Hotel Employees and Restaurant Employees Union, Local 57 ("HERE") several exclusive privileges and powers that enable it—above all other unions—to become the Employees' collective bargaining representative. Although the agreement recites that its purpose is to "ensur[e] an orderly environment for the exercise by the Employees of their rights under Section 7 of the National Labor Relations Act ("NLRA")," (Memorandum of Agreement, ¶ 2),[2] Employees Jetter and Harlich assert that the true nature and effect of this agreement is to suppress their § 7 right to refrain from unionism, and foist upon them a union which they do not support—all without an NLRB-supervised secret-ballot election in which they and their co-workers are given the chance to vote their consciences in private.

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[2]The Memorandum of Agreement between Sage and HERE is reproduced as Appendix G to Sage's Petition for Writ of Certiorari.

When this case was before the Third Circuit, Employees Jetter and Harlich filed a Motion to Intervene, which was denied. Nevertheless, the Employees still want their § 7 rights protected from schemes to foist HERE upon them. They wish to hear all sides of the story regarding HERE and its background and purposes, and do not want their employer silenced. They feel unfairly targeted by HERE's "card check" process, which counts the signing of a union authorization card as a "vote" in favor of the union. Most importantly, the Employees fervently desire the freedom to choose a union—*or refrain therefrom*—through the NLRB's secret-ballot election process.

Neither the City of Pittsburgh, Sage, nor HERE asked these Employees if they wished to be grist for a "neutrality and card check" agreement covering their unionization. Yet, the city ordinance and the agreement limit what employees can be told about the union, provide HERE with their home addresses and personal information, and eliminate their ability to vote their consciences in private in a secret–ballot election. By filing the accompanying *amici* brief, Employees Jetter and Harlich seek to protect these crucial interests under § 7 of the NLRA.

QUESTION PRESENTED

The *Amici* hereby adopt and incorporate by reference the Petitioner's Question Presented.

STATEMENT OF THE CASE

The *Amici* hereby adopt and incorporate by reference the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

This Court has recognized that the paramount purpose of the federal labor law system is "voluntary unionism," to provide employees with the right to choose or reject union representation. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). The "neutrality and card check" arrangements at issue in this case are not favored by federal labor policy, for they hinder employees' § 7 right to choose or reject a union. These neutrality and card check arrangements prevent employees from hearing both sides of the story about unionization, by placing a gag on employer speech. These arrangements give unions access to employees' home addresses and other personal information, thereby opening employees to abusive "home visits" and other union pressure. Finally, these arrangements waive government-supervised secret-ballot elections, and thereby increase the chances that employees will be coerced into signing union authorization cards which are counted as "votes" for the union. Usually negotiated in secret by unions that covet new members and employers that covet "labor peace," these neutrality and card check arrangements do not enhance the § 7 interests of the employees.

REASONS FOR GRANTING THE PETITION

I. The "Neutrality and Card Check" Agreement Mandated by the City of Pittsburgh Ordinance Destroys, Rather Than Enhances, Employees' § 7 Rights.

A. Introduction.

The Petitioner has demonstrated that the Third Circuit's ruling is erroneous and conflicts with the decisions of this Court. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218 (1993); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986);

see also Chamber of Commerce v. Lockyer, 364 F.3d 1154 (9th Cir. 2004) (Petition for Rehearing pending). This Court's review is needed to ensure that state and local governments such as the City of Pittsburgh do not interfere with the federal labor law system crafted by Congress. The City of Pittsburgh ordinance must be held preempted because of its heavy-handed interference with private labor relations matters best left to the NLRB and the free flow of economic forces. *See, e.g., Wisconsin Dep't of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

Thus, the *Amici* adopt the Petitioner's well-crafted arguments concerning the preemption issue, and will not repeat them here. Instead, *Amici* will focus on the fact that so-called "neutrality and card check" agreements, like the one that the City of Pittsburgh foisted upon Sage, destroy employees' § 7 right to freely choose *or reject* a labor union. As such, HERE has no basis to argue that such agreements enhance employee freedom of choice or are "favored" by federal labor policy.

The Third Circuit refused to take employees' § 7 interests into account when it held that this neutrality agreement "benefits *both parties* [Sage and HERE] with efficiency and cost saving." *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 219 (3d Cir. 2004). The court of appeals rejected the Motion to Intervene filed by Employees Jetter and Harlich, and further rejected Sage's effort to raise the employees' § 7 interests, holding that Sage lacked standing to assert any rights of its employees that may be infringed under the agreement. *Id.* Thus, since employees were not parties in the underlying litigation, their interests in challenging neutrality and card check agreements were neither considered nor protected by the court below.

B. Governmental Entities Mandate Neutrality and Card Check Agreements in Order to Curtail Employees' § 7 Right to Refrain.

This Court has recognized that the paramount purpose of the federal labor law system is "voluntary unionism," to provide employees with the right to choose *or reject* union representation. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985); *see also Bloom v. NLRB*, 153 F.3d 844, 849-50 (8th Cir. 1998) (citations omitted), *vacated on other grounds sub nom. OPEIU Local 12 v. Bloom*, 525 U.S. 1133 (1999) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected."). But, as will be shown below, neutrality and card check agreements subvert employees' right to voluntary unionism by, *inter alia*, imposing arbitrary limits on what they can hear from their employer, allowing unions to pressure and coerce employees into signing union authorization cards, and eliminating the right to an NLRB-supervised secret–ballot election in which employees can vote their consciences in private.

Precisely because these neutrality and card check agreements limit employee freedom of choice and thereby grease the skids for an anointed union to gain exclusive representation rights, state and local governments have shown an increasing penchant for mandating them. *See, e.g., Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, ____ F. Supp. 2d ____, No. 01-C-0149, 2005 WL 433139 (E.D. Wis. Feb. 11, 2005); *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001); *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004).

Unions rely upon government officials to mandate neutrality and card check agreements because they face a steady decline in the number of employees voluntarily choosing union

representation when given a free choice in a secret-ballot election. Financial self-interest has driven unions to search for new ways, often underhanded, of acquiring dues paying members.[3] The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes." Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, Lab. L.J., Summer/Fall 1996, at 176. By design, employees have fewer legal protections "outside the traditional representation processes," and thus little possibility of protecting their rights under § 7 to resist the union organizing campaigns targeting them. *See, e.g., Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); NLRB General Counsel Arthur Rosenfeld's Report on Recent Case Developments, No. R-2544, Nov. 17, 2004, http://www.nlrb.gov/nlrb/press/releases/r2544.pdf.

The use of "card checks" and the waiving of secret-ballot elections inevitably lead to an increase in union coercion and intimidation, as employees are pressured into signing authorization cards that are counted as "votes" for unionization. This Court has long recognized the illicit pressures that unions

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[3]The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9% of wage and salary workers were union members, down from 13.3% in 2002, according to the U.S. Department of Labor, http://www.bls.gov/news.relase/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 % in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982, the United Auto Workers claimed 1.14 million members, but by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% does not appear to be flocking to join. *IBM Corp.*, 341 N.L.R.B. No. 148, at 19 n.9. 2004 WL 1335742, at *18 n.9 (2004).

can bring to bear against employees who refuse to sign a union authorization card. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974) (there exists "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *see also NLRB v. Gissel Packing Co.*, 395 U.S. 575, 601-10 (1969). These pressures are magnified when employees are subjected to a neutrality and card check agreement that they neither sought nor approved.

In short, state and local governments and their allies in the union movement advocate "neutrality and card check" not because they enhance employees' rights under § 7, but because they limit those rights and hinder every employee who wishes to exercise his or her right to refrain from unionization.

C. Provisions Common to Most Neutrality and Card Check Agreements Limit Employee Freedom of Choice and Thereby Harm the Principle of Voluntary Unionism Embedded in § 7.

In a recent speech to the American Bar Association, NLRB Chairman Robert Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties." Daily Lab. Rep., *Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting*, Aug. 15, 2003, at B-1. He was correct, as demonstrated by these common "neutrality" provisions that limit what employees can hear from their employer and hinder employees' § 7 right to freely choose or reject unionization.

1) Gag rule: Although most neutrality agreements purport to require the employer to remain "neutral," in reality

they impose a gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

The Memorandum of Agreement between Sage and HERE, ¶ 4, states that SAGE may not "do any action or make any statements that will directly or indirectly state or imply opposition by the Employer." But what does this clause really mean? In practice, it requires Sage to refuse to provide even truthful information in response to direct employee questions about HERE and its motives and history.

For example, in 1985, the President's Commission on Organized Crime found that HERE's international affiliate "has a documented relationship with the Chicago "Outfit" of *La Cosa Nostra* at the international level and subject to the influence of the Gambino, Colombo, and Philadelphia *La Cosa Nostra* families at the local level." *The Edge: Organized Crime, Business and Labor Unions*. But what if an employee learns of this sordid history and asks Sage about it and its impact on the union's current structure and intentions? The neutrality agreement mandated by the City of Pittsburgh prevents Sage from responding truthfully to employee questions both about HERE's past criminal activities and its current purposes and motivations. *Service Employees Int'l Union v. St. Vincent Med. Center*, 344 F.3d 977 (9th Cir. 2003) (union alleges various employer speech violates the neutrality agreement); *International Union, UAW v. Dana Corp.*, 697 F.2d 718 (6th Cir. 1983) (same); *International Union, UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002)

(same). Such limitations on employer free speech are intentionally designed to squelch debate and keep employees in the dark about the history and motives of the union that covets them.[4]

Indeed, the Ninth Circuit in *Lockyer* recognized that such state-enforced limits on the dissemination of truthful information cannot survive a preemption challenge because "an overriding principle of the NLRA is that the collective bargaining process cannot function unless *both employers and employees* have the ability to engage in open and robust debate concerning unionization." *Chamber of Commerce v. Lockyer*, 364 F.3d 1154, 1166 (9th Cir. 2004); *see also Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

Neither the City of Pittsburgh nor any other governmental entity has a legitimate interest in halting the employer's and employees' exchange of truthful information about HERE or any other union. Indeed, § 8(c) of the NLRA, 29 U.S.C. § 158(c), was designed to "implement[] the First Amendment," *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), and thereby encourage such exchanges of truthful information, not squelch them. Housekeepers, cooks, and bartenders seeking truthful information about a particular union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else by order of the City of Pittsburgh." Employer silence extracted by a union and

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[4]The idea that union officials act in their own self-interest, even committing crimes to do so, is not far-fetched. *Arroyo v. United States*, 359 U.S. 419 (1959) (union official accepted bribes from management); *United States v. Ryan*, 350 U.S. 299 (1956) (same).

enforced by a local government does not enhance the employee's ability to make a free and informed decision under § 7. Instead, by purposefully keeping employees in the dark and limiting all debate, these union and city-imposed gag rules prevent the free flow of ideas that are critical to informed decision making and employee freedom of choice.

2) Union access to employees' personal information and employers' premises: The neutrality agreement foisted upon Sage by the City of Pittsburgh requires the employer to provide the anointed union, HERE, with personal information about the targeted employees, including home addresses and phone numbers. Sage's employees were never asked to consent to the release of their personal information. HERE was also given permission to enter company property during work hours to solicit employee support and collect union authorization cards, even though unions normally have very limited rights of access to employer premises. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

Armed with broad access to employees in both their homes and workplaces, unions subject employees to relentless group pressure to sign authorization cards. Faith Jetter has attested to this coercion in the sworn Declaration that she filed with the Third Circuit in support of her Motion to Intervene.

> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an

> invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

Sadly, these sorts of pressure tactics are the stock-in-trade of union organizers intent on procuring signatures from fearful or unsuspecting employees. In another recent NLRB case concerning the enforcement of a neutrality agreement, an employee subject to a UAW "card check" drive attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, *Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004).

Given such testimony, it is not surprising that this Court has recognized and condemned the abuses that often occur in the collection of union authorization cards. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301, 306 (1974). Nevertheless, the underlying purpose of these neutrality and card check agreements is to give unions broad access to all employees in order to perpetuate these abuses, and allow unions to force themselves upon even unwilling employees.

3) Waiver of secret-ballot election: Perhaps most egregiously, neutrality and card check agreements waive NLRB-supervised secret-ballot elections and substitute the "card check recognition" process, in which a signed authorization card counts as a "vote" for the union. Thus, the two most self-interested parties—the union that covets more dues payors and the employer that needs "labor peace"—prevent the employees from voting their consciences in private. Unions repeat the Orwellian mantra that "secret ballot elections are unfair,"[5] but experience shows that the process of soliciting union authorization cards relies upon coercion and misrepresentations, oftentimes with the complicity of the "neutral" employer. *Duane Reade, Inc.*, 338 N.L.R.B. No. 140, 2003 WL 1891062 (2003) ("neutral" employer unlawfully assisted union with organizing several of its stores, including forcing employees to sign authorization cards), *enforced*, 99 Fed. Appx. 240, 2004 WL 1238336 (D.C. Cir. 2004). Sometimes employees are threatened with bodily injury if they refuse to sign union cards. *See HCF, Inc.*, 321 N.L.R.B. 1320 (1996) (union militant warned an employee that if she didn't sign an authorization card "the union would come and get her children").

Ironically, the AFL-CIO argues that signature cards advocating *decertification* of a union "are not sufficiently reliable indicia of the employees' desires," and that already-unionized employees must resort to an NLRB-supervised secret-ballot election before they can remove the union. Brief of the AFL-CIO to the NLRB in *Chelsea Indus. & Levitz Furniture Co.*

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[5]The website of the recently merged Union of Needletrades, Textiles & Industrial Employees and Hotel Employees & Restaurant Employees International Union (UNITE HERE) claims that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#.

(May 18, 1998) (No. 7-CA-36846). Clearly, labor union officials are not advocating the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can avoid secret-ballot elections and bring to bear enormous pressure on vulnerable employees to sign the cards.

Indeed, the union-controlled process of collecting signed authorization cards (akin to the "rule of the jungle") should be contrasted with the NLRB's longstanding rules governing the conduct of a secret-ballot election, for the contrast could not be more stark. In NLRB-supervised secret-ballot elections, even subtle pressures have been found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. Those pressures need not rise to the level of an unfair labor practice to allow the Board to set aside the election result. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). But unions operating under neutrality and card check agreements often become exclusive bargaining representatives by engaging in intimidating actions that would preclude them from obtaining such status if committed during the course of a secret-ballot election.

For example, in a NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring invalidation of the election: electioneering activities at the polling place;[6] prolonged conversations by representatives of a union or employer with prospective voters

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[6] *Alliance Ware, Inc.*, 92 N.L.R.B. 55 (1950); *Claussen Baking Co.*, 134 N.L.R.B. 111 (1961).

in the polling area;[7] electioneering among the lines of employees waiting to vote;[8] speechmaking by a union or employer to massed groups or captive audiences within twenty-four hours of the election;[9] a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list);[10] and a union official handling a prospective voter's ballot.[11]

Such conduct disturbs the "laboratory conditions" necessary for employee free choice when it occurs during NLRB-supervised secret-ballot elections, yet it occurs in almost every card check drive. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is made in the presence of one or more union organizers soliciting the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech, or it could occur in the employee's own home

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[7] *Milchem, Inc.*, 170 N.L.R.B. 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.").

[8] *Bio-Medical Applications*, 269 N.L.R.B. 827 (1984); *Pepsi Bottling Co.*, 291 N.L.R.B. 578 (1988).

[9] *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953).

[10] *Piggly-Wiggly*, 168 N.L.R.B. 792 (1967).

[11] *Fessler & Bowman, Inc.*, 341 N.L.R.B. No. 122, at 3, 2004 WL 1091057, at *4 (2004). In *Fessler*, the Board recognized the potential danger when a union official merely touched a prospective voter's ballot. On that basis the Board set aside an election and created prophylactic rules to ensure the integrity of the election process.

during an unsolicited union "home visit." In all cases the union handles the "ballot" of the prospective "voter." Finally, in all cases the employee's decision is not secret, as in an election, because the union has a master list of who has signed an authorization card and who has not.

Thus, a choice against signing a union card often does not end the decision-making process for an employee in the maw of a "card check campaign," but represents only the beginning of harassment and intimidation for that employee. This Court has already recognized this danger.

> We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue.

NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969).

In sharp contrast to the abuses inherent in any "card check" campaign, each employee participating in a NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end.

Thus, only in an Orwellian world can HERE and the City of Pittsburgh claim that "we safeguard employee freedom by

doing away with the secret ballot election."[12] Certainly no Iraqi or Afghani who participated in those nations' historic elections would agree that a "card check" done in public is freer and fairer than a secret ballot election. In short, employee free choice and § 7 rights are not enhanced by the demise of the secret-ballot election and the total exclusion of the NLRB from the representational process. HERE and the City of Pittsburgh have no legitimate interest in forcing such terms upon unwilling employers and employees.

D. Neutrality and Card Check Agreements Are Not "Favored" by the Labor Laws So As to Excuse the Conduct of the City of Pittsburgh.

What is a typical hotel worker to think when confronted with this array of special privileges given by his or her employer to a single, anointed union? Surely it cannot be said that such neutrality and card check agreements enhance the employee's freedom to choose or reject a union. Thus, these agreements are not "favored" by federal labor policy, and this is especially true when they are mandated by a state or local government looking to tilt the playing field of labor relations in favor of union representation. *See Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001); *Chamber of Commerce v. Lockyer*, 364 F.3d 1154 (9th Cir. 2004); *see also Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004); *Patterson v. Heartland Indus. Partners, LLP,* 225 F.R.D. 204 (N.D. Ohio 2004).

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[12]Unions do make this outrageous claim. For example, UNITE HERE's web-site asserts that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#.

To the contrary, federal labor policy favors robust debate. *Linn v. Plant Guard Workers Local 114*, 383 U.S. 53 (1966) (Court applies constitutional protections to employees' speech as it relates to the statutory scheme of the NLRA); *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (protecting employees' right in the workplace setting to petition their legislators); *Lee v. NLRB*, 393 F.3d 491, 494-95 (4th Cir. 2005) (employees have the right under § 7 to refuse to wear union insignia on their work uniforms, even though the collective bargaining agreement mandates the wearing of such insignia). Federal labor policy does not favor enforced "gag orders" and other limits on free speech and the free exchange of ideas. *Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.").

Similarly, federal labor policy favors free and fair secret-ballot elections, not "Potemkin village" card checks dressed up to look like elections. Although unions' self-interest dictates the elimination of the secret ballot, this Court and the NLRB have recognized "that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." *Gissel Packing*, 395 U.S. at 602; *see also Dana Corp.*, 341 N.L.R.B. No. 150, 2004 WL 1329345 (2004).[13]

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[13]Congress is also looking to weigh in on this timely issue. On May 12, 2004, Rep. Charlie Norwood introduced H.R. 4343, the Secret Ballot Protection Act of 2004, to amend the NLRA to ensure the right of employees to a secret-ballot election conducted by the NLRB. This stands in sharp contrast to the proposed Employee Free Choice Act, legislation introduced by Sen. Ted Kennedy (S. 1925) and Rep. George Miller (H.R. 3619), that would essentially ban secret-ballot elections by mandating the acceptance of card checks.

In short, neither HERE nor the City of Pittsburgh can validly claim that federal labor policy "favors" the type of agreement at issue here. To the contrary, such collusive agreements hinder employees' § 7 rights and are to be soundly condemned because they conflict with the goals and policies of the NLRA. *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491 (1984) (state regulation of unions in the casino industry was lawful because the regulations did not conflict with the purposes and policies of the NLRA).

CONCLUSION

The Petition for Writ of Certiorari should be granted, and this case set for plenary consideration.

Glenn M. Taubman*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510

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*Counsel of Record for *Amici Curiae*